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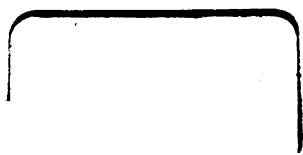
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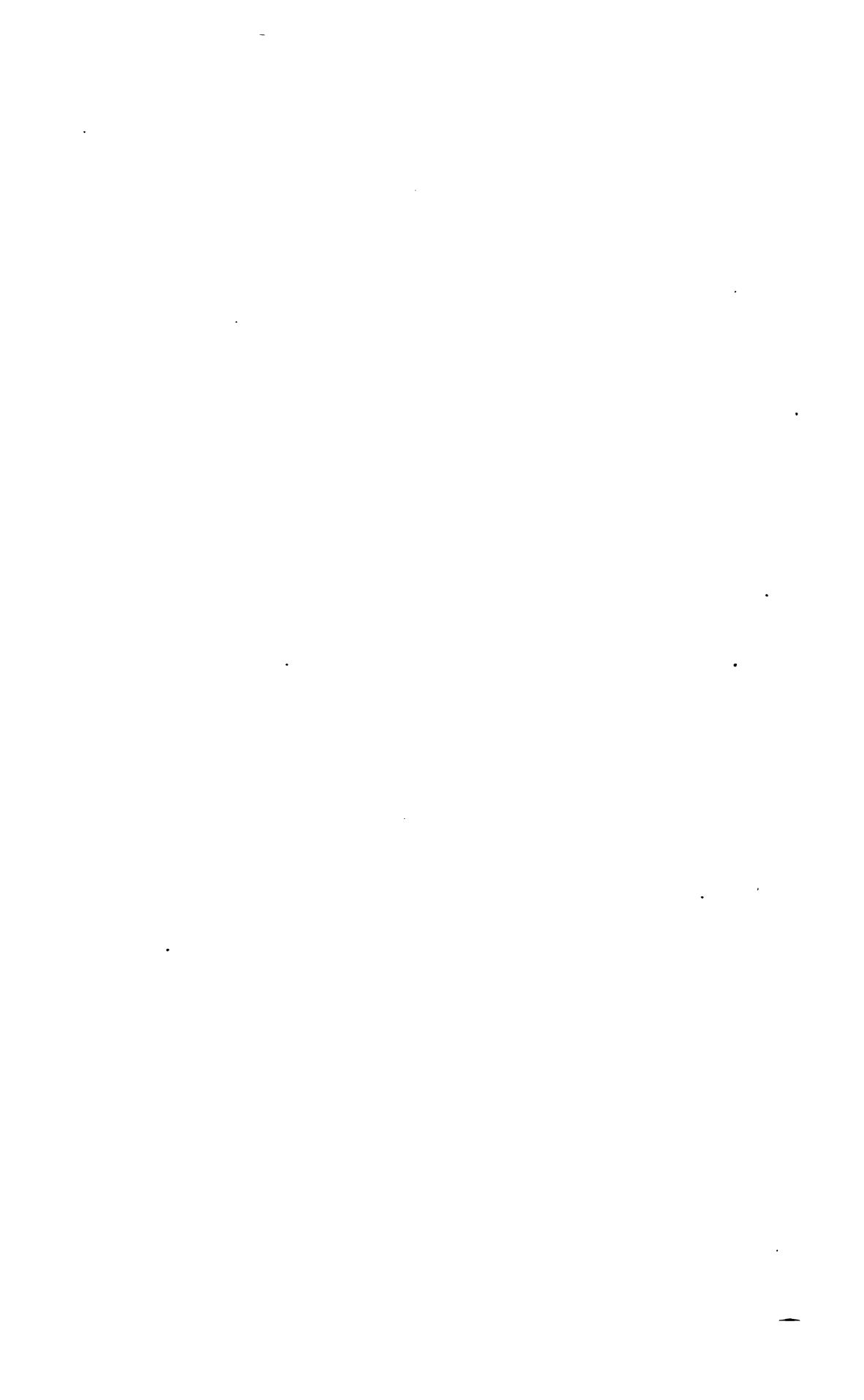
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS
AT
Doctors' Commons,
AND IN THE
HIGH COURT OF DELEGATES.

By J. ADDAMS, LL. D.

AN ADVOCATE IN DOCTORS' COMMONS.

*Intacta, Judicia reddita in curiis supremis et principalibus, atque
causis gravioribus, præsertim dubiis, quæque aliquid habent difficul-
tatis aut novitatis, diligenter et cum fide excipiunt. Modus hujus-
modi judicia excipiendi, et in scripta referendi, talis esto. Casus
præcisè, judicia ipsa exacte, perscribito: rationes judiciorum, quas
adduxerunt judices, adjicito: de advocatorum perorationibus, sileto.*

BACON DE AUGM. SCIENT. in lib. viii. c. 3.

VOL. I.

CONTAINING CASES FROM HILARY TERM 1822,

TO TRINITY TERM 1823, INCLUSIVE.

IN CONTINUATION OF

THE ECCLESIASTICAL REPORTS OF DR. PHILLIMORE.

LONDON.

**PRINTED FOR S. SWEET, LAW BOOKSELLER, CHANCERY LANE;
AND R. MILLIKEN, DUBLIN.**

1823.

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THE Editor, having completed the first Volume of a New Series of Ecclesiastical Reports, takes this opportunity of stating his intention of continuing to publish them, upon the *present plan*—which differs but little from that adopted by the *late* Editor; and perfectly accords with the system recommended by Lord BACON, in the aphorisms selected to adorn the title-page. This he is fully satisfied is the best, not to say the only mode, of reporting cases of *ordinary* occurrence in the *ecclesiastical* courts, with any degree of uniformity and consistency—although he is sensible that, in *one* respect, it may be, and is, prudently departed from, by those who record the proceedings of *other* courts of judicature.

The decisions of the “Court of Delegates” being only conveyed to the public in the terms of their “*decrees*,” it is *necessary*, in reporting the proceedings of *that* court, to accompany the “case,” with the “*argument and decree*,” instead of the “*judgment*,” which follows the “case,” (and, generally speaking, *at once*) in *other* instances. This is stated, to explain what might seem *anomalous*,

in the conduct of these Reports, to the reader, unacquainted with the practice of the "Court of Delegates" in this particular.

It only remains, that the Editor should acknowledge the liberal assistance which he has received from the gentlemen of his own Bar, (especially from his kind friend, the Editor of the former Series) in the compilation of these Reports—and the encouragement which has been extended to him by the learned Judge, who determined by far the greater, and the very principal, part of the following Cases.

DOCTORS' COMMONS,
October, 1823.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons;

AND IN THE

HIGH COURT OF DELEGATES.

ARCHES COURT OF CANTERBURY.

PERRIN v. PERRIN.

(*On the Admission of the Libel.*)

1822.
Hilary
Term.
1st Session.

THIS was a suit for a separation *à mensâ et thoro*, by reason of adultery, promoted by William Perrin against his wife Frances Eleanor Perrin.

The three first articles of the libel pleaded, in substance, the marriage of the parties on the 7th of April, 1818,—and their subsequent cohabitation, as husband and wife, until the 26th of February, 1820. The fourth article then went on to plead,

The wife's incontinence in her single state not pleadable in the first instance by the husband, in a suit for a separation *à mensâ et thoro*, by reason of adultery, against the wife.

“That on Saturday the said 26th day of February, in the year 1820, the said William Perrin was informed, and it then for the first time came to his knowledge, that his wife the said Frances Eleanor

1822.
Hilary
Term.

~~~~~  
PERRIN  
v.  
PERRIN.

Perrin had, previous to their aforesaid marriage, carried on a lewd and criminal intercourse with a person named ———, by whom she had become pregnant, and that she had been delivered of a male child, begotten on her body by the said ———; that she had also, previous to their said marriage, carried on a like intercourse with another person named ———, by whom she had also become pregnant, and that she had been delivered of a female child, begotten on her body by the said ———; and that she the said Frances Eleanor Perrin had, since her said marriage, continued to receive, from the first of her said paramours, an allowance of 40*l.* per annum, and an allowance of 20*l.* per annum from the second. That on receiving such information, the said William Perrin, in the presence and hearing of her mother Frances Hislop, and others their mutual friends, charged his said wife with the misconduct hereinbefore pleaded; the several circumstances of which she, the said Frances Eleanor Perrin, then and there, admitted to be true. That the said William Perrin thereupon determined to, and did accordingly, separate himself from his said wife, and on the following Monday, the 28th day of the said month of February, quitted his house in Pitt's Place, leaving his said wife therein, and did not return to the same;—that on the 13th day of the month of March following, a deed of separation was entered into, and executed, by and between the said William Perrin on the one part, and the said Frances Eleanor Perrin and Frances Hislop on the other part, whereby it was agreed, that the said William Perrin and Frances Eleanor



Perrin should live separate and apart from each other, and that the said William Perrin should make his said wife an allowance of 1*l.* 11*s.* 6*d.* per week for her board and maintenance:—that the weekly allowance aforesaid was regularly paid by the said William Perrin from the time of the execution of the said deed of separation up to Saturday the 25th day of August last (1821) inclusive, in the beginning of which month the facts after pleaded first came to the knowledge of the said William Perrin."

The subsequent articles of the libel pleaded various acts of adultery committed by the wife after the separation, which, coming to the husband's knowledge, gave occasion to the present suit.

#### JUDGMENT.

Sir JOHN NICHOLL.

The objections to the admission of this libel are confined to the fourth article, which pleads the incontinence of the wife with two persons, neither of whom is an alleged adulterer in the cause, prior to the celebration of the marriage. It is objected, that the marriage was a waiver of all former misconduct on the part of the wife;—that as no sentence of separation can be founded on the wife's incontinence prior to the marriage, it is improperly mixed up in a suit which is limited, in its object, to the obtaining of that sentence;—and that the effect of its introduction is injurious to the wife, as disposing the Court to a belief of those charges, which being proved to its satisfaction, it is bound to pronounce as prayed by the husband.

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Term.

~~~~~  
PERRIN
v.
PERRIN.

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v.
PERRIN.

It is said, however, on the other hand, that the matter objected to is pleaded, not to criminate the wife, but in apology for the conduct of the husband—and to apprize the Court of the fact that the parties were living separate and apart, at the time when the adultery in question is alleged to have been committed. But to compass this last object, which is all that is requisite, it will be sufficient if the fact of separation be pleaded, generally, without a detail of the circumstances under which that separation was had. All which it is necessary, and, therefore, all which it is proper for the Court to be informed of is, that the parties, at the time in question, *were* living separate by mutual consent. If indeed the wife should set up a case of desertion by the husband, without any provocation on her part, her antenuptial misconduct might be fairly pleaded in his justification. It might, possibly, too, be fairly pleaded by the husband, responsively to the wife's libel, in a suit for restitution of conjugal rights. But, in this stage, at least, of the present cause, I am of opinion that its allegation is improper, and, consequently, I direct the fourth article of this libel to be reformed (a), by the omission of that part of

(a) The article stood as reformed,

"That in the month of February, in the year 1820, some unhappy differences having arisen between the said William Perrin and Frances Eleanor Perrin his wife, it was mutually agreed between them, that they should thenceforth live separate and apart from each other;—and that the said William Perrin should make his said wife an allowance of 1*l.* 11*s.* 6*d.* per week for her board and maintenance;—that accordingly, on Monday, the 28th day of February, the said William Perrin quitted his said house in Pitt's Place, leaving his said wife

it which pleads the wife's incontinence in her single state. The wife, by these means, is precluded from suffering any injury by the production of extraneous matter unfavourable to her defence; and even the husband may be ultimately benefited in being saved the expence of going into proof of facts, which, after all, may have little bearing upon the real question at issue in this cause.

1822.
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PERRIN
v.
PERRIN.

therein, and did not return to the same;—that the weekly allowance aforesaid was from that time regularly paid to the said Frances Eleanor Perrin by the said William Perrin, up to Saturday, the 25th day of August last, inclusive, in the beginning of which month the facts after pleaded first came to the knowledge of the said William Perrin."

The omission of the "deed of separation" in the article, as reformed, was occasioned by the counsel for Mrs. Perrin insisting on its being annexed to the libel, if it were specifically pleaded.

CHICHESTER v. THE MARQUESS AND MARCHIONESS OF DONEGAL.

(An Appeal from the Consistory Court of London.)

1822.
Hilary
Term.
4th Session.

THIS was a cause of nullity of marriage by reason (as alleged) of minority, promoted and brought originally in the Consistory Court of London, by the Most Honorable George Augustus Marquess

If a party cited as within the jurisdiction of an Ecclesiastical Court, though actually resident within

another jurisdiction, appear and submit to the suit, such original defendant (*a fortiori* one cited to see proceedings by such original defendant) is bound to the jurisdiction.

1822.

*Hilary**Term.*

CHICHESTER

v.
DONEGAL.

of Donegal, of the parish of St. Mary-le-bone, in the county of Middlesex, and diocese of London, and province of Canterbury, against the Most Honorable Charlotte Anna, Marchioness of Donegal (wife of the said Most Honorable George Augustus Marquess of Donegal), the said Marchioness of Donegal being, in such cause, described as Charlotte Anna May, spinster, falsely calling herself Marchioness of Donegal, of the parish of St. James's, in the county, diocese, and province aforesaid.

The history of this cause, and the proceedings had in it, are so fully detailed in the judgment^(a), that any preliminary statement of them would be mere tautology.

JUDGMENT.

Sir JOHN NICHOLL.

This is an appeal from the Consistory Court of London, where the suit was originally depending. It was a cause of nullity of marriage "by reason of minority, and want of legal consent," promoted by the Marquess of Donegal against the Marchioness of Donegal, or, as she is described in the proceedings, against Charlotte Anna May, spinster, falsely calling herself Marchioness of Donegal.

The citation was returned on the 2d Session of Easter term, 1821, and, on the same day, an appearance was given for the party cited, and a libel prayed. That libel was brought in on the 3d Session, or next following Court day—on which day, a decree to see proceedings in the cause,

(a) Wherever this occurs, it is the editor's wish to confine himself to the judgment only.

with the usual intimation, was taken out against Arthur Chichester and George Chichester, Esqrs. the lawful nephews of the plaintiff, and against Sir Arthur Chichester, Bart., and the Rev. Edward Chichester, Clerk, two collateral kinsmen in the next degree—the presumptive heirs in succession, to the plaintiff's honors and estates, in the event of marriage with the defendant, sought to be impugned in the present suit, being pronounced null and void. This "decree to see proceedings" was directed to issue by the Judge, on motion of counsel, and at the instance of the defendant. It was returned, duly served upon three of the parties cited, on the 4th Session. A decree, by letters of request, was served upon George Chichester, Esq. the fourth party cited, in another diocese—and was returned on the 1st Session of Trinity term.

1822.
Hilary
Term.
CHICHESTER
v.
DONESAL

On the 4th Session of Easter term, the Judge admitted the libel, to which the proctor for the Marchioness (confessing only the marriage as pleaded) gave a negative issue.—At the same time, by way of further answer to the libel, he asserted, and then brought in, an allegation, which stood for admission on the 1st Session of the ensuing term. On the same day, the Judge, on motion of counsel, founded upon affidavits of the witness's age and infirmity, permitted Dame Elizabeth May, widow, to be examined upon this allegation *de bene esse*. Afterwards, sitting the Court, a proctor appeared for Arthur Chichester, Esq. but under protest to the jurisdiction of the Court, which he asserted that he would be ready to extend by the next Court day; and prayed, that no examination *de bene esse* of

1822.
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Term.

CHICHESTER
v.
DONEGAL.

Dame Elizabeth May should be had in the interval—to which prayer however the Judge, after hearing counsel on both sides, refused to accede.

The act entered into, on the part of Mr. Arthur Chichester, on one side, and of the Marquess and Marchioness of Donegal, severally, on the other, was not sped and concluded till the bye-day of the following term. It was argued on the 28th of July; and, further, on the 1st of August, two sittings of the Court after term; when the Judge was pleased, as the minute expresses it, "to overrule the protest so far as respected the jurisdiction of the Court by reason of the alleged residence of the party originally cited." From this order of Court, the proctor for Mr. Chichester appealed *instantly*; and was assigned to prosecute his appeal by the 1st Session of the next term. The Judge then proceeded to admit to proof the allegation brought in on the part of the Marchioness, which had *stood on admission* ever since the 4th Session of the preceding term, and a decree for answers, compulsories, and commissions, and requisitions for taking the evidence, were directed to issue in the ordinary course. On the same day Dame Elizabeth May was produced as a witness, and subsequently examined. All this in the presence, and without opposition on the part, of the proctor for the Marquess. No further step appears to have been taken in the cause till the 15th of August, when other witnesses were produced, and admitted, before a surrogate, whose examinations were taken in due course.

The inhibition in this Court was extracted on the 17th of September, was served on the 24th; and

was returned on the 1st Session of Michaelmas term. The libel of appeal was brought in on the 4th Session—and, on the bye-day of that term, its admission was opposed, as not disclosing, upon the face of it, an appealable grievance. But the Court was of opinion that this objection could only be taken by an appearance under protest to the inhibition. The Court therefore admitted the libel of appeal, as declining to pronounce upon the merits of the appeal, with nothing before it but the libel only. The process has been since brought in, in proof of that libel, and the appeal has been solemnly argued—and it now becomes the duty of the Court to pronounce, upon full information, on the whole matter of the alleged grievance.

1822.
Hilary
Term.
CHICHESTER
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The pleadings and prayers on either side are, in substance, to this effect. The libel pleads, that the party against whom the proceedings are had was illegitimate—was a minor—and was married by license, with no other consent than that of her putative father. It prays therefore a sentence, pronouncing and declaring the said marriage to have been null and void, by reason that a putative father is incompetent to give that consent to the marriage of a minor, by license, which is required by the marriage act (a).

The defence set up is, not the defendant's legitimacy, or that her putative father's consent to her marriage was valid in law; but it is—that she was a *major* at the time of her marriage, notwithstanding her supposed *minority*; and, consequently, that she was capable of contracting lawful matrimony

(a) *Horner v. Liddiard*, Consistory, 24th May, 1790.

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by license, without any consent at all. Her allegation pleads, that she was born in the month of March, 1774, and, therefore, that she was twenty-one years and nearly five months old when married to the plaintiff (then Lord Belfast) in the month of August, 1795. On this ground it is prayed that the marriage so had, and sought to be impugned on the suggestions made in the libel, may be pronounced good and valid.

And here, in the first place, I must observe, that this allegation, upon the face of it, discloses the defendant's case as to the *single* material fact, with the utmost particularity. It specifies the exact time and place of the mother's delivery in 1774; it vouches, by name, the parties immediately privy to that delivery, as the midwife, the nurse, &c.; distinguishing, as it goes, those who are dead from the survivors. It establishes (in plea that is) the identity of the infant so born with the present defendant, by circumstances which, if established in evidence, are conclusive of that fact. It not simply, therefore, apprizes an adverse party of the nature of the case set up in defence, but fully instructs him how, and where, measures may be taken, and inquiries made, by which, if other than genuine, that case may be met and refuted.

Nor can the Court in this place omit also to observe, upon the substance of the decree to see proceedings which has issued in the cause. For this is not, as has been suggested, a compulsory process, menacing the parties cited with any penalty in case of non-appearance—it merely invites them to become parties to the suit, if they deem it their interest so to do—with intimation—that otherwise the suit



will proceed in their absence. The decree therefore was hardly more than a legal notice of suit; and, to what inconvenience it could subject the parties cited, is not very obvious: it left them at liberty to appear or not to appear, to act or not to act in the cause, *ad libita*.

The grievances on the part of the Judge of the Consistory *specially* appealed from, as set forth in the several instruments of appeal, are, 1st. "that he, the said Judge, over-ruled the protest entered on the part of Arthur Chichester, Esq. to the citation issued and returned against him, to see the proceedings in the cause, *so far as respected the jurisdiction of the Court by reason of the alleged residence of the party originally cited*;" and, secondly, that he "proceeded to do further acts in the cause, (to wit, by admitting an allegation, and granting a decree for answers, compulsories, &c.) notwithstanding an appeal from the protest being so, in part, over-ruled, was entered, *instantly*, by the proctor for the said Arthur Chichester, and *deferred* to, on the part of the Judge, by the assignation of a term for the prosecution of the said appeal." It will be proper, therefore, or convenient at least, to consider these heads of grievance, in the order in which they thus present themselves.

When Mr. Arthur Chichester, the present appellant, appeared in the Court below under protest—he was assigned, technically speaking, "*to extend his protest*;" that is, to state his grounds of exception to the jurisdiction of the Court in a sort of informal plea, which is termed, in our Courts, "An act of Petition." The very object of that assignation was, that such grounds of exception

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should be stated, specifically, and distinctly so, that both the Court and the adverse party might be duly apprized of them; and in order that the latter might furnish, if able so to do, a counterstatement upon any matter either of law or fact. Now, upon adverting to the act of Court, which I must presume to have been entered into with this view, I am rather surprised at the present appeal. For the act, as originally extended, has not one word in respect to Lady Donegal's residence in Ireland, but alleges grounds of protest of quite a distinct and dissimilar nature. The grounds of protest stated in the act are, *that* no instance occurs of the issue of a similar process in any suit of nullity of marriage, where the alleged ground of nullity was a breach of the marriage act; *that* as no remainderman can institute this species of suit for his own benefit, so neither is he compellable to become a party to it for that of any body else; *that* the party cited has no *direct, immediate*, interest in the point at issue in the cause; and *that* neither the proceedings had, nor the sentence pronounced in it, will be, legally, binding on him. The act, therefore, prays, that the Judge will, for all these several reasons, pronounce "the said Arthur Chichester, Esq. to have been unduly and illegally cited, and will dismiss him from any further observance of justice in the cause, with costs." In support of that prayer it goes on to charge, that "the proceedings carrying on in the suit between the Marquess and Marchioness of Donegal are collusive;" and that the object of the suit is "to uphold a pretended marriage by fraud and connivance:" and, in verification of this charge, it travels into a variety of extraneous matter (par-

ficularly as with reference to certain affairs of Lord Belfast, the plaintiff's eldest son, in the year 1819,) not very regularly introduced, it must be admitted, into a mere question of protest. Now, it is obvious that all this had nothing whatever to do with the jurisdiction of the Court below, so far as it depended on "the residence of Lady Donegal in Ireland." And yet the Courts pronouncing for its jurisdiction, notwithstanding such residence, originally constituted the sole, as it still does the principal grievance, that is drawn, by the present appeal, into this Court.

The protest, so extended, was replied to, severally, on the parts of both Lord and Lady Donegal; the latter insisting on the propriety of the decree taken out, on grounds to which I shall presently have occasion to advert; and both denying, explicitly, the charge of collusion, either in the institution, or conduct, of the suit. It is in a rejoinder on this reply that the alleged fact of residence first discloses itself; namely, that Lady Donegal "had been continually for the four years last past, and then was, resident in Ireland." Now it is manifest, as well from its place or position in the act, as from the immediate context of this averment (a), that it was

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(a) "And the said Shephard (the proctor for Mr. Chichester) further alleged, that whereas it is alleged by the said Glennie (proctor for the Marquess of Donegal) that his said party, the said Marquess of Donegal, instituted proceedings against his said wife, without her concurrence and against her approbation, and denied that in the said suit the libel or allegation, or other proceedings, have been concerted, agreed upon, or settled by or between, and in behalf of the said Marquess of Donegal and Charlotte Anna May, calling herself Marchioness of Donegal; now the said Shephard denied the same to be true, and alleged

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originally introduced into the cause for a mere incidental purpose; namely, that of fixing, on the original parties in the suit, a charge of collusion; and not as a ground of protest, properly so called. The matter therefore of residence, as applying to the jurisdiction of the Court, between Lord and Lady Donegal, was a mere objection, taken by counsel in the argument upon the protest; and how the over-ruling that "*objection*" (for *such* the minute should have termed it, and not "a part of the protest," since of the protest, properly speaking, it formed *no* part) can be a matter of appeal at all is first to be considered. Possibly the alleged fact of residence might be untrue, and might stand uncontradicted, simply from the adverse parties not being aware of the supposed bearing of that fact upon the question of jurisdiction. They might possibly, and not very unreasonably, think that the charge of collusion itself was too immaterial to the question of jurisdiction to call for the *particular* negation of any fact, adduced merely in support of that charge. At any rate the proof of the alleged fact, which rests simply upon the affidavit of a

that the said Charlotte Anna May, falsely calling herself Marchioness of Donegal, *has been continually for upwards of four years last past, and still is resident in Ireland*—that the citation in this cause issued under seal of this Court on the 12th day of May last, and that, on the 14th of the same month, the letters missive of the Judge of this Court were shewn by the officer to the said Blake (the proctor for the Marchioness of Donegal), who undertook to accept the service thereof for the said Marchioness, and to appear and defend this suit; and that the citation was returned into Court by the said Glennie on the 18th of May, and an appearance immediately given thereto on the part of the said Marchioness by the said Blake."

Mr. Robinson (*a*), as to "hearing and belief," is of the slenderest possible description.

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Now, to apply these observations to the present question of appeal. The prayer of the act, as I have already stated, was, that the Judge would pronounce Mr. Arthur Chichester to have been "unduly cited," and would "dismiss him, with costs;" and this upon grounds not including, but wholly foreign to, the matter of Lady Donegal's residence in Ireland. In the course of the argument upon that act, an objection is taken to the jurisdiction of the Court to entertain the suit at all, even as between Lord and Lady Donegal, on the ground of such residence; which the Judge of that Court might, I think, very properly over-rule, *as not considering it part of the protest*: though whether he so over-ruled it, upon that, or upon any other consideration, is a point on which I am uninformed. But how the over-ruling of that objection, upon *any* consideration, could be a grievance on the present appellant—a party cited merely to see the proceedings in the cause—is what I am wholly at a loss to discover. The Judge of the Consistory Court, in making the order appealed from, neither assigned this party "to appear absolutely," nor refused to "dismiss him," as prayed in his protest—that matter—the whole matter of protest, properly speaking—stood undetermined. Possibly the Judge, but for the intervention of the appeal, might have pro-

(*a*) "And this deponent saith that he hath heard and verily believes that the said Charlotte Anna May, calling herself Marchioness of Donegal, hath been continually for four years last past, or *thereabouts*, and still is, resident in Ireland." Affidavit of Mr. Stratford Robinson, sworn on the 18th July, 1821.

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ceeded, on the same Court day, to dismiss this party. I say *possibly*—for I would be understood as intimating no opinion of the *probability* of such an event. I rather, perhaps, infer that the contrary was probable. In suffering or ordering this decree to issue the Judge appealed from appears to have considered, that it could at least lead to no injustice to give parties so deeply interested, as those in remainder, notice of the proceedings, and to afford them an opportunity of intervening, if they thought it for their interest, leaving it for them to choose whether they would appear or not. He seems to have conceived, that as persons in remainder had been allowed to bring suits of nullity, to declare a marriage void, by reason of consanguinity, as in the case of *Maynard v. Heselrige* (a), and, in other instances; so, by analogy, and upon principle, they *might* also possibly be entitled, even to institute such an original suit under the marriage act, though no instance had yet occurred—the more especially, as the marriage act itself is of no very remote antiquity, and as suits of nullity, under that act, were, comparatively, unfrequent, till in quite modern times. Perhaps he concluded, at the same time, that it was unnecessary for him to dismiss the party, as the party might attain the effect of that dismissal by the simple process of not appearing. But upon these, and similar, points the Court below intimated no opinion, and still less does this Court; they were undetermined by the Judge from whom this appeal is brought, and they have scarcely been touched upon, even in

(a) *Maynard v. Heselrige*, Commissary of Surry's Court, Hil. 1789. Mich. 1790. See too the case of *Faremouth and others v. Watson*, 1 Phill. 355.

argument before me. I desire therefore to be understood as expressing no opinion whatever, whether the Judge of the Consistory would have done right, or would have done wrong, in complying with the prayer of the protest; but, under that protest, the want of jurisdiction as between the parties principal on account of the residence of the defendant not being regularly before the Court—not being a part of the protest, properly so called, as extended in the act,—I am strongly disposed to hold, that the over-ruling of a mere objection on that account, taken at the hearing (and which the other parties had not been called upon to answer, *eo intuitu*, by the act), was no matter of appeal.

But taking it on the other hand that the defendant's residence in Ireland *was* made a *part of his protest* by the present appellant, in the Court below, still I am of opinion that the Court below was perfectly correct in pronouncing for its jurisdiction. It is certainly true, that both the canon (*a*) and the statute law (*b*) forbid the citing of parties out of their dioceses, or peculiar jurisdictions. But it is equally true that the rule, at least in the statute law (*c*), was meant for the benefit of the subject; which benefit it hath uniformly, as far as I see, been held to provide for sufficiently, by giving defendants who are so cited a privilege of pleading to the jurisdiction. Consequently, if a party who is so cited once waive that privilege, by appearing and submitting to the suit, he or she is bound to

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(a) Vide Gib. Cod. 1004. 1006.

(b) 23 Hen. 8. c. 9. (the bill of citations.)

(c) Vide preamble of 23 Hen. 8. c. 9.

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the jurisdiction (a). What then was the condition of the present defendant at the period of this protest? A citation had issued, describing her as "resident within the diocese of London (b)"—To that citation she had appeared. A libel was given, pleading the fact of her residence within the same diocese—On that libel she had joined issue. *She* had not objected to the jurisdiction of the Court below, at the time when the point appealed from was determined by that Court; nor has she yet objected, as far as I am aware, to the jurisdiction of this Court. I have carefully looked through all the authorities to which I have been referred, in the course of the argument (c), by the counsel on both sides; and I am satisfied that no objection, on the ground of residence, to the jurisdiction of the Consistory Court could, in *that* stage of the proceeding, have been taken even by the original defendant. Still less then could it be taken by *this* defendant (if indeed the term defendant is applicable to a party cited merely to see proceedings by the *original* defendant); and who, to crown the whole, is cited *within* HIS diocese. What possible injury, or inconvenience, can *this* party have sustained from the

(a) See Hetley, 19. 1 Vent. 61. Carth. 33. Show. 161, &c.

(b) Had the citation *described* her as resident in Ireland or elsewhere, out of the local jurisdiction of the Court, the error would have been fatal; possibly if objected even after sentence; as the Court's want of jurisdiction would have been apparent *on the face of the record*. The Judge too in that case would have been clearly liable to the penalties denounced in the bill of citations, namely, the forfeiture of double damages and costs to the party, and of 10*l.* (for every person so cited), half to the king, and half to the informer, to be recovered in a *qui tam* action.

(c) Vide n. (a), *supra*.

suit being prosecuted in the Court appealed from (a)? Neither the spirit, nor letter even, of the canon and statute law, are applicable to him. That it was competent for *this* party to object the residence of the original defendant (appearing too, and under protest, to a process taken out by that very defendant) is a conclusion at which I should have some difficulty in arriving, even were I to hold, which I do not, that it was competent to the original defendant, in that stage of the proceeding, to have objected this matter of residence so as to oust the jurisdiction of the Consistory Court, for herself.

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But, lastly, independent of all this, could even the original defendant have taken this objection with effect, in *any* stage of the proceeding; or, in other words, was not the Consistory Court of London the legal jurisdiction notwithstanding her actual residence, as alleged, during a certain period in Ireland? A party may have two domiciles, the one actual, the other legal; and, *prima facie* at least, the husband's actual, and the wife's legal domicile, are one, where-soever the wife may be, personally, resident (b). Now it is admitted that the husband's domicile is

Quære, whether a citation of the wife, at the domicile of the husband, is not sufficient to found the jurisdiction of the Court in a suit, even of nullity of marriage against the wife, wheresoever the wife may be actually resident?

(a) Upon similar principles his Honor, the Vice-Chancellor, when applied to, on behalf of Mr. Chichester, for a prohibition to restrain the Consistory Court of London from proceeding in this suit, refused the prohibition. Vice-Chancellor's Court, 4th August, 1821.

(b) Upon this principle of the domicile of the husband being the legal domicile of the wife, I apprehend that a citation of the wife at the domicile of the husband is clearly sufficient to found the jurisdiction of the Ecclesiastical Court in a suit for a separation *à mensâ et thoro*, by reason of adultery. It is necessary of course to fix the wife with notice of the suit.

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within the diocese of London. Mr. Chichester, too, has even alleged in his act that the parties are still cohabiting ; nor can it be suggested that they were living asunder, under any legal separation, at the commencement of this suit. Lady Donegal has a right, and is bound, whensoever called upon, to return to the Marquess's domicile, provided her marriage is, what she contends it to have been, a good and valid marriage : so that upon this, independent of other considerations, London appears to me to have been *sufficiently* the residence, or domicile, of the defendant, to found the jurisdiction of the Consistory Court of London in a suit of this description. Add to this, that the parties were married in London—it is therefore the "*Forum Contractus*"—also, that the validity of the marriage is to be pronounced upon by the law matrimonial of this country, not of Ireland ; a country to which our marriage act does not extend ; and the law of which, we all know, to be materially different from that of England, as to what is, and what constitutes, a valid marriage—a consideration upon which alone to have instituted this proceeding in Ireland, the only *other* alternative, would have savoured strongly of that fraud and collusion, imputations of which are so liberally cast in the act of Court. In every view therefore which the Court can take of the subject, it is of opinion, that the Judge of the Court appealed from was right in over-ruling the objection taken on behalf of the present appellant.

It still however remains to be considered, whether he was equally correct in proceeding in the suit, as between the principal parties, notwithstanding, and after, an appeal entered from the first head of

grievance—that just disposed of—by the present appellant. Now I take it that in appeals, at least from grievances, the hands of the Court are in no case tied up till the service of the inhibition (a); and that what, or whether any intermediate steps shall be taken, depends upon the particular circumstances of the case, the Judge of the Court exercising, in that respect, a sound legal discretion. If it be said, that the Judge, in this case, had tied up his own hands, by *deferring to the appeal*, I answer that it rested with this Court, and not with him to determine, whether the matter in fact appealed from was, or was not, in its nature, an appealable grievance (b); and, consequently, that he was bound to defer to the appeal, so far as the mere assigning of a term to prosecute can be construed a *deference* to it (c).

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(a) *Appellatio à diffinitiva, statim cum fuit interposita, ligat manus judicis à quo, ut non possit procedere ad aliquem actum ulterius in illà causâ. Sed appellatio ab interlocutoriâ, non ligat manus judicis à quo, quin possit procedere ad ulteriora, donec per judicem appellationis fuerit inhibitum.* Maranta, lib. vi. act. 2, s. 160. 162; and Lancellott (De Attentatis) 2 pars. ch. 12. lim. 1. No. 1 & 2.

(b) *Adverte, quod discussio appellationis, an sit justa vel injusta, frivola vel non frivola, non spectat ad judicem à quo appellatur, sed ad judicem ad quem.* Lyndw. Com. in Const. Mephm. in Concilio, &c. Vide quoque Decretal. 15 in sexto, c. 10.

(c) *Regulariter, judex à quo, tenetur quantibet appellationem admittere. Si ipsam judex non admittit, seu non defert illi, mittitur ad superiorem puniendus, arbitrio superioris, de jure canonico.* Maranta, lib. vi. 2. 388. Vide quoque Covarr. tom. 2 pract. quest. c. 23. n. 4; and Lancellott, 2 pars. c. 12. Ampl. 5. No. 11. 15. Maranta, for instance, limits this, it is true, to cases in which appeals are not prohibited by law; and in the number of appeals which are prohibited by law, he reckons, by

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by the Judge
à quo on the
same Court-
day, but after
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ed;

The several acts, had and done, in supposed prejudice of the original appeal, and which are charged in the libel of appeal as *attemptats* (a), were so had and done, either on the Court day on which the appeal was entered, or subsequent thereto, but prior to the issue of the inhibition, or, again, after the issue and service of the inhibition. Now, as to the first of these, it has been constantly held, that all the several acts of one Court day, constitute, as

a reference to a former passage [ib. 335, 336.], "*appellationes frivole*," that is, "*vane et inane, et sine justa causâ interposita, quæ nullum poterint sortiri juris effectum*," so that in these "*non tenetur judex appellationi deferre*."* But it is apprehended that appeals must be such, very manifestly indeed, to warrant a refusal to defer to them on the part of the Judge à quo, so far as this can be collected from their simple admission. As for assigning the appellant to prosecute them within a given term, this follows upon their admission naturally, not to say necessarily; for otherwise, it should seem that the suit might remain suspended *ad infinitum*. To determine whether the appeal be founded or not, except in extreme cases, clearly belongs to the Judge *ad quem*.

(a) An *attemptat*, in the language of the civil and canon laws, is any thing whatsoever, wrongfully innovated or attempted in the suit by the Judge à quo, pending an appeal.

* "*Quando autem*," says Lancelott, [2 pars. c. 12. lim. 6. n. 27, 28.] "*appellatio quæ de jure tanquam frivola non fuisset admittenda, fuisset de facto admittenda, facit attemptata, &c.*;" and to the same purport Maranta [ubi sup. n. 171.] and others. But it not only seems highly unreasonable in itself, except in extreme cases, and hardly accordant with what is laid down, for instance, by Lancelott, [ubi sup. Amp. 5. n. 11, 12.] with respect to the admission of appeals [namely, "*quod semper in dubio, est appellationi deferendum, ut dicunt OMNES*;" and that "*etiamsi judex admisit appellationem non admittendam, sit a peccat excusandus, &c.*"], that whatsoever is done by the Judge à quo, after the bare admission of an appeal, must, in all cases, and necessarily, be an *attemptat*; but he himself admits [ubi sup. lim. 6. n. 40, 41.] a diversity of opinions as to this matter—and that "*appellatio frivola, etiamsi per judicem fuerit admissa de facto, non facit attemptata*," according to so *ne* authoriti. 3.

with reference to this head of *attentats*, but *one* act, notwithstanding an appeal intermediate, or *between* those acts, accompanied with the several formalities of depositing money for the stamp, and so forth. As for the second, no ulterior step appears to have been taken in the cause till the 15th of August, within which period there was surely time sufficient to have extracted, and served the inhibition (*a*); so that, no inhibition having been served, the surrogates admitting certain witnesses to be produced, &c. (the ulterior step taken) on the 15th of August, still amounts to no *attentat*, in my judgment. On the 17th of September, and not before, the inhibition is extracted, and is served on the 24th. Whatever steps were taken, subsequent to the service of the inhibition, would be nullities of course, provided the appellant had been *founded* in his first appeal. But that appeal being frivolous and unfounded, he has no right to demand the revocation even of these, as *attentats* (*b*), at the hands of this Court. He

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and subsequent thereto, but prior to the service of the inhibition

and subsequent to, even the service of the inhibition, the defendant not being founded in his first appeal, held to be no *attentats*.

(a) It was intimated in this place by the counsel for Mr. Chichester, that the earlier issue of the inhibition had been prevented by a caveat against the issue being entered in the Arches Registry. But to this it was replied by the counsel for Lady Donegal, that a notice in the nature of a caveat against the issue of the inhibition, had, indeed, been served upon the Registrar of the Court of Arches, upon the authority of the precedent in Lord Herbert's Case [2 Phillimore, 430], but that such notice was not served till the 15th of August, and that it was subducted prior to any application being made, on the part of Mr. Chichester, for the inhibition.

(b) *Illa quæ post appellationem interpositam, ante diffinitivam sententiam, innovantur, donec appellationis causam veram esse constiterit, revocari non debent; nisi judex appellationis (postquam sibi constiterit ex causâ probabili fore ad se negotium*

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is to be considered as having withdrawn from the Consistory Court (a Court having cognizance of the suit) at his own risk, and is to be remitted there; leaving it to the Judge of that Court to proceed upon the whole question, and between all the parties, as the justice of the case may appear to require (a).

devolutum) *inhibeat*, *CANONICE**, *judici à quo appellatum extitit, ne procedat; tunc enim, quicquid post inhibitionem HUIUSMODI** fuerit innovatum, est, (licet causa eadem non sit vera) *per eundem appellationis judicem, ante omnia in statum pristinum reducendum.*—Decret. lib. ii. tit. 15. c. 7. in sexto.

It may be proper to observe, that the Judge *à quo*, had never, at any time, been so inhibited in *this* cause, nor had the requisitions of the 97th canon been complied with, on the part of the appellant; before the going out of the inhibition, which actually issued in the cause. In other words, the Judge, *ad quem*, had not that constat of the truth of the grievance appealed from, prior to its issue, which was necessary to the full validity of the inhibition [Vide Marant, vi. 2. 196, 197], and without which, the above passage from the decretals plainly implies, that steps taken by the Judge *à quo*, though in fact inhibited, are not, necessarily, revocable as *attentats*.—See also upon this head Gaill. lib. i. Obs. 144. n. 4. and Ayliffe, par. 297, 298.

(a) It was thrown out by the Judge, in the progress of the argument, that the regular course for procuring the revocation of *attentats*, was by a separate proceeding, civil or criminal, as against the Judge *à quo*, and that it was not by charging the supposed *attentats*, accumulatively, in a mere ordinary libel of appeal.

The latter of these (the criminal) was the course adopted in the case of Luke and Fisher, which was a proceeding by articles in the Consistory Court of Exeter, promoted by Luke against Fisher, Surrogate of the Archdeacon of Cornwall, for (an

* See also Lancellott de Attent. 2 pars. c. 12. lim. 6. s. 16, 17. who lays down "*quod inhibitiō vigore frustratoriæ appellationis non potest operari effectum, ex quo non potest dici canonica,*" and that "*inhibitiō tunc tantum operetur effectum attentatorum quando est canonica.*"

This whole proceeding to be considered as one of a peculiar character. There are circumstances, as between *all* the parties, which tend to excite the vigilance of the Court, and to claim no inconsiderable share of its strictest attention. As between the original parties, the Court is bound to pronounce,

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attentat in that) having decreed Luke the promovent, to be certified for a contempt, in a cause of subtraction of tithes, &c. (then depending in the Archidiaconal Court of Cornwall, between Whitaker, Rector of Ruanlanihorne, and the said Luke, one of his parishioners), under the statute of 27 Hen. 8. c. 20. he, Fisher, issued, or caused to issue, a certificate of such contempt under seal of the Archdeacon of Cornwall, to certain justices of the peace for the county of Cornwall, after an appeal to the Consistory Court of Exeter from the said decree, made on the part of Luke, and admitted by Fisher, in contempt, &c. of the said appeal. The Judge at Exeter dismissed this proceeding, *generally*, with costs, from which sentence an appeal, on the part of Luke, was prosecuted to the Court of Arches. The Dean of the Arches (Dr. Calvert) pronounced* for the appeal, and retained the principal cause, and therein revoked the pretended certificate (the *attentat*,—a step not taken by the Judge *à quo*—), but affirmed so much of the decree appealed from, as dismissed the respondent from the original citation with costs†, and gave no costs of the appeal. Luke, the appellant, in the Arches Court, again appealed from this sentence to the delegates.

This appeal came on to be heard at Serjeants' Inn, on the 26th of May, 1789; when the Judges Delegates, Sir Henry Gould, Knt.; Sir William Henry Ashhurst, Knt.; Sir Richard Perryn, Knt.; and William Macham and John Fisher, Doctors of Law, pronounced against the appeal—Affirmed the sentence of the Judge appealed from, and condemned Luke, the appellant, in the costs of the appeal.

* *Trinity Term*, 1786, 4th Session.

† It appeared by the evidence that the issue of the certificate was owing to the imprudence of the registrar (not a party proceeded against) who put the seal to it, unknown to the Surrogate, after the suspension of the decree by the admission of the appeal.

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according to the existing law applicable to the facts in issue, substantiated by evidence; without suffering its judgment to be biassed by any consideration of the hardship, real or supposed, with which possibly that law may bear upon their particular case. For instance, if this marriage shall ultimately prove to be null and void in law, the Court in which the suit is then depending, is bound, however painful to itself, so to pronounce it; nay, more, it is bound to look narrowly into the nature and proof of those facts by which a sentence of nullity may be sought to be averted. Here are great interests at stake. Lord and Lady Donegal may very possibly, and very naturally, feel a strong wish to sustain a marriage, which has subsisted nearly thirty years; and which has given birth to no fewer than seven male issue, whom a sentence of nullity must, at once, deprive, of every legal and hereditary claim. They may also very possibly, and naturally, wish, and for obvious reasons, that their legal state and condition shall be ascertained, by the sentence of a Court of competent jurisdiction, be that legal state and condition, eventually, what it may. The proceedings had in the cause, certainly, tend to shew, that the suit, as between the principal parties, is *amicably* conducted. But this mere circumstance of amicable conduct in the suit does not warrant an imputation, that the parties are, fraudulently, colluding to procure a sentence, contrary to the truth of the facts, and to the law applicable to those facts. One strong presumption against the existence of such collusion, in the present case, is this very step of citing the parties, one of whom is the present appellant, to see the proceedings. For

I think it scarcely possible that, considering the known privileges of *intervention*, a final sentence can be had in a suit of this description by collusion, but in the absence of all parties who are interested to detect and defeat it.

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Still, however, the Court appealed from was bound to be on its guard, and to look into proceedings had between the parties principal in the cause, with a jealous eye. Nor did it behove it to be less careful in watching over the conduct of this third party, especially in the article of *delay*—since he too had great interests at stake, and was placed in a situation which, as with reference to those interests, obviously suggested to him the *policy of delay*. If the birth of Lady Donegal really occurred half a century back, direct evidence of that fact could only be had from the mouths of witnesses far advanced in life—and the loss of their testimony might wholly defeat the real justice of the case. This party, too, had an obvious interest in *delaying* a declaratory sentence even of nullity: for in that event of the suit, the plaintiff may try the experiment "*convolandi ad alteras nuptias*," in the prospect of legitimate issue to inherit his honors and estates—a prospect, which, it need not be observed, becomes fainter, in proportion as the period for making that experiment recedes. Under these circumstances, the Court below was called upon, in point of justice, not to suffer, on the eve of a long vacation, the cause to be tied up, as between the principal parties, by the appeal of this third party—and, consequently, I am of opinion, that neither on the one, nor the other, head of grievance, can the ap-

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peal and complaint preferred to this Court, be sustained.

I pronounce, therefore, against this appeal, and remit the cause (*a*); and, although the appellant

(*a*) This cause was remitted accordingly to the Consistory Court of London, the Judge of which Court [Sir Christopher Robinson], proceeding according to the tenor of the former acts, "over-ruled" the protest entered on behalf of Arthur Chichester, Esq." but did not assign him to appear absolutely. A proctor then, however, *did* appear absolutely for the said Arthur Chichester, and prayed to be heard on the admission of the allegation thencefore admitted on the part of the Marchioness of Donegal [vide page 8, ante]; which prayer the Judge was pleased† to reject. At the same time, by consent of the counsel for the Marquess and Marchioness of Donegal, he decreed a monition to issue against the witnesses already produced and examined upon the said allegation, to attend for the purpose of being examined upon interrogatories, to be administered on behalf of the said Arthur Chichester.

But now by 3 Geo. 4. c. 75, s. 1, so much of 26 Geo. 2. c. 33, as provides, "that all marriages solemnized by licence after the 25th of March, 1754, where either of the parties (not being a widower or a widow) shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age (if then living), first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried); or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery, shall be absolutely null and void to all intents and purposes whatever;" is repealed, so far as relates to any marriage to be *subsequently* solemnized.

And the second section of the same act provides, "that in all cases of marriage had and solemnized *before* the passing

* 1st Session, Easter Term, 1822.

† 2d Session, Easter Term, 1822.

ought not to be abridged of any fair means of fully investigating the case set up by one of the respondents, yet in prevention of future delays in that quarter whence too many have already proceeded, and by which, as I have already said, the real justice of this case may be defeated, I think that I am bound to accompany this sentence with a decree for costs.

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of that act, without any such consent as is required by that part of 26 Geo. 2. c. 33 (the old marriage act), recited in, and repealed, by the first section: and where the parties shall have continued to live together, as husband and wife, till the death of one of them, or till the passing of the act; or shall only have discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage,—such marriage shall be deemed good and valid to all intents and purposes whatsoever.”

It is to be presumed, that in consequence of these enactments, the above suit has virtually determined.

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PREROGATIVE COURT OF CANTERBURY.

ROGERS and BROWNING *v.* PITTIS.

JUDGMENT.

Sir JOHN NICHOLL.

A codicil operates as the re-publication of that will to which it applies; and, consequently, as the revocation of any intermediate will.

James Stephens the testator in this cause, died on the 11th of June, 1820. His first testamentary paper before the Court, in point of time, is a duly executed will, which is dated on the 30th of July, 1814. The substance of it is a bequest of a certain cottage at Brook Green, of his household goods, plate, and other articles, and of a life annuity of 50*l.* to his housekeeper Elizabeth Vesey. The rest and residue of his property, real and personal, are bequeathed by it to his three nieces, namely, Mrs. Rogers, Mrs. Pittis, and Mrs. Browning—and Mr. How and Mr. New are appointed executors.

On the 4th of June, 1817, the deceased is alleged to have executed another will: the substance of this will is to give the whole of his property, real and personal, to his niece, Mrs. Pittis, subject only to the life annuity of 50*l.* to Elizabeth Vesey; and this will appoints Mr. Pittis, the husband of the principal legatee, and Mr. New, executors, to the exclusion of Mr. How.

There is also a third instrument before the Court, which is a codicil dated the 5th of June, 1820. By that codicil, the deceased gives certain provisions, which were in the house, and a furze-house, described as standing near the yard gate, to his house-

keeper Vesey, the same person mentioned in both the former instruments. This codicil is written on the lower part of the third side, or page, of the will of 1814, just below the deceased's signature, and the subscriptions of the attesting witnesses.

The will of 1814, together with this codicil, is set up on the part of the two nieces, Mrs. Rogers and Mrs. Browning; the will of 1817 is propounded by the husband of the third niece, Mrs. Pittis; and the questions in the cause for the Court to determine, are, 1st, whether the *factum* of this last instrument, the codicil of June, 1820, is sufficiently proved: 2d, with which of the wills, being proved, is it to be taken in conjunction.

Now, to prove this codicil, two witnesses have been examined, the one, Robert Rayner, the attesting witness, the other Mr. James How, the writer of the codicil, who has renounced the executorship of the will of 1814, in order to become competent as a witness in the cause.

The account of the transaction given by Rayner, a neighbour of the deceased, and employed by the deceased in his trade, which was that of a shoemaker, is to this effect:—He says that he well remembers being sent for one morning to Farmer Stephens, whom he found sitting up in his bed, with Mr. How, also a neighbour and intimate acquaintance of the deceased, seated, near the bed side, at a table, on which were pens and ink, and a written paper—Vesey, the deceased's housekeeper, was also present. On being introduced into the bed-room, the deceased, after the usual salutations, said to the deponent "I have been adding to my will, in order to give Betty all the provisions and

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cured meats," of which there was a great abundance at that time in the house. He also said, that he should give her one of the furze houses, "to be taken over the way" meaning, as the deponent understood, to a cottage on the green, opposite his house. He then observed that this addition to his will, had been written by Mr. How, and that he, the deceased, wished the deponent to attest the execution of it. How, at the same time, observed, that he *had* read over the codicil, which he had just been preparing, to the deceased, and that the deceased approved of it. The deceased then executed the codicil, by putting his mark to it, declining the offered assistance of Mr. How, and said "It was all quite right—it was all very well" and that "he would never make any other alteration in his will." The codicil was then subscribed by the deponent as a witness to the execution of it; after which he retired, being desired by the deceased to take some refreshment down stairs. He adds that the deceased appeared in pretty good spirits, and much better than he expected to find him, and was of perfectly sound mind, memory, and understanding. I may just observe by the way, that the deceased's capacity at, and during, the premises, is admitted in all hands. There is nothing in fact to impeach it; for although he is described as sitting up in bed, supported by bolsters, and extremely feeble in bodily health at the time in question—yet there was nothing in the nature of his disease, or otherwise, to occasion mental incapacity. Nor was the deceased *in extremis*, for he survived this transaction of the codicil upwards of six days.

Now, the circumstances deposed to by this witness—the manner in which the deceased received him on his first introduction—his declared knowledge of the contents of the instruments—his expressed desire that the witness should attest its execution—his mode of executing the instrument—his declaring himself perfectly satisfied with the contents of it, and that he would make no other or further additions to his will; all these circumstances bring up this case, completely, within the rules of evidence of intention. This witness's account, if true, proves every thing that is necessary to establish the *factum* of the codicil; and, as to the truth of the account, the credibility of this witness has suffered no attack, either in plea or argument, nor is it liable, that I am aware of, to the slightest imputation.

If, however, it were necessary that the deposition of this witness should be, it is, corroborated very fully by that of Mr. How, the other party present at the transaction—for his account of that part of the transaction which occurred after Rayner came into the room, is precisely similar to Rayner's own account—so that there are two witnesses deposing together, and *contesting*, to the making of this codicil; and supposing Mr. How to be shaken in credit as a witness, still, upon his deposition in conjunction with that of Rayner, by his evidence as corroborating, or corroborated by, that of Rayner, the codicil must be held sufficiently proved.

Upon the question, however, of the credit due to Mr. How, as a witness, I can by no means ~~made~~ myself to think it materially affected. He is described as a yeoman, of considerable property,

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and great respectability—he is an individual, in short, against whose general character, there is no impeachment. He was the deceased's confidential friend, and the principal manager of his affairs after his brother's death, about ten years preceding his own—and he is perfectly disinterested, as taking no benefit to himself, either under the will, or the codicil. It is true, indeed, with all this, that he has deposed, positively, to a fact in the case, as to which the preponderance of evidence satisfies me that his deposition is erroneous. But the question, in its bearing upon that of his general credibility, is, whether he has so sworn falsely and corruptly, or whether he has so deposed, though in error, still honestly and sincerely. I have no hesitation whatever in acquitting him of having so sworn corruptly. It is a mere collateral and immaterial fact, upon which the contradiction arises, namely, whether the will, bearing date on the 30th of July, 1814, was executed upon that day, or whether it was executed three or four months after, on a day in the month of October (a). The instrument is equally valid in either case, and the time

(a) On which day, the deceased executed the conveyance of an estate which he had previously sold, for 1000*l.* to Mr. Basset, of Newport. The witness (How) insisted that the will was executed on the same day (the 19th of October), and not in July. He accounted for the “*date*” by stating that the instructions were given, and the will was prepared in July; and that it was so dated by Mr. Worsley, in expectation that the deceased would have attended at Newport to execute it upon the 30th of that month; that not having done so, the matter stood over till the 19th of October—when the will was actually executed by the deceased; but without the date, inserted as above, having first been altered.

of execution has no bearing whatever upon the question of its re-publication by the codicil. He has certainly deposed, in this particular, with a degree of blameable confidence in the face of the instrument itself, and the attesting witnesses; but that very confidence tends to shew his sincerity—for he must have been aware that the three attesting witnesses, supported by the instrument itself, might, and probably would be, as they have, in fact, been, brought to contradict him.

But it has been contended that, at all events, this witness is so inaccurate and so defective, in point of memory, that the Court ought to place no reliance upon him, even though it should acquit him of intentional falsehood. This, however, is not a sound argument, to that extent at least, in my judgment. It by no means follows, that because a witness is inaccurate as to the *date* of a transaction which occurred six years before his examination, *no* reliance can be placed upon his memory as to *facts* and *circumstances* that passed only as many months before; and which facts and circumstances must have early become *fixed* in his mind, by his attention being called to them in consequence of proceedings to which they almost immediately gave rise. I think, therefore, that I cannot reject the evidence of this witness altogether, on the score of inaccuracy or deficiency of memory.

The other circumstance objected to this witness is, his having written receipts on the back of his own bond for 1000*l.* lent to him by the deceased, acknowledging the payment of interest, and having signed those receipts himself. But this only proves to me, that neither of these parties were in habits

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of business, and that they were acting towards each other with that want of circumspection, proceeding from their mutual confidence in each other, which is by no means unusual in persons of their class and occupation. The deceased is proved to have been a person of very great indolence—and this witness signing the *last* of these receipts with the deceased's *name*, which has been much insisted upon, could hardly, by possibility, have been for any purpose of fraud. There appears to me no attempt whatever to imitate the deceased's hand-writing, such as it was. The bond, too, was to remain in the deceased's own possession—so, that this witness should have *forged* his signature at the back of it—that is, should have placed it there for any purpose of fraud—is quite out of the question. The occurrence at first sight may be startling to those who are accustomed to transact business in a more orderly and methodical manner—but it is an occurrence of no uncommon sort, between country farmers—something very similar to it would have passed, between two persons of this class, no long time back, under my own eye, but for my intervention. I think, therefore, that this objection does not materially detract from the credit due to Mr. How, any more than the preceding objections—and, giving him credit—he not only corroborates, and is corroborated, by the attesting witness—but he speaks to the history of the making and preparing of this codicil in a manner, which does not leave a doubt in my mind that it was legally prepared and executed, and is, in itself, a valid instrument.

The codicil then being, in the judgment of the Court, proved, and valid, the next consideration is, with which of the two wills is it to operate in conjunction? the will of 1814, or the will of 1817.

Now this I take solely to depend upon the result of a necessary *previous* inquiry, which is, to which of these two wills is the instrument in question to be taken as a codicil: For I apprehend the law to be settled, 1st, that making a codicil to a will republishes that will; 2d, that the re-publication of a former will supersedes one of a later date, and re-establishes the first. If, therefore, this codicil is to be taken as a codicil to the will of 1814, I shall have no hesitation in pronouncing for it in conjunction with that will, notwithstanding the intermediate will of 1817.

1. First, then, I apprehend it to be clearly settled, that making a codicil to a will, republishes that will—that a codicil even of personalty, if executed *so as to act on the subject*, that is, if attested by three witnesses, republishes a will of lands; so that a will of personalty *à fortiori*, or a mixed will so far as respects personalty, is republished by a codicil, whether so attested or not. No evidence of intention to republish is requisite, in either case; the very act of making the codicil, *primâ facie* at least, infers the intention. It is true, indeed, that this *primâ facie* inference may be rebutted by proof, that the act was done by the deceased, in error, or obtained from him, by fraud. So the cancellation of a will may be shewn to have taken place in error, or the execution of a new will to have been procured by fraud. *Primâ facie* at least, however, the making of a codicil to a will, as

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much republishes that will, as a will is revoked; *primâ facie*, by its cancellation, and as a new will; *primâ facie*, annuls, and makes void any will of a prior date.

2. Secondly, the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to its own date, and makes it *speak*, as it were, *at that time*. In short, the will so republished, is, to all intents and purposes, a new will(a). Consequently, upon the ordinary and universal principle, that of any number of wills, the last, and newest, is that in force, it revokes any will of a date prior to that of the republication.

By the cases quoted of the Attorney-General *v. Downing* (b), of *Barnes v. Crowe* (c), of *Walpole v. Cholmondely* (d), and the rest, both these points seem to be clearly established, in the judgments of other Courts. It may be satisfactory to shew, that in a case where the same points fell under the consideration of this Court, they were viewed in the same light, and determined upon the same principle.

I allude to the case of *Jansen and Field v. Jan-*

(a) So far as this principle has been carried, that where a testator had made his will in December, 1734, *before* the statute of Mortmain, 9 Geo. 2. c. 36. and devised all the residue of his personal estate to be laid out in land, and settled to certain *charitable uses*, and had confirmed that will by a codicil made in July, 1739, *after* the statute, the codicil, by making the will a new will, was held to bring the devise within the statute; and so much of the will as related to the residue of the testator's personal estate, was, consequently, held to be void.—Vide Attorney-General *v. Heartwell*, Amb. 451.

(b) See Amb. 571, and the cases there cited.

(c) 1 Ves. jun. 486.

(d) 7 Durnford & East, 138.

sen, which occurred here in Trinity Term, 1797, in which case I was of counsel. The deceased, in that case, had executed a will dated on the 21st of July, 1792; he had made another will dated on the 18th of July, 1796; lastly, there was a codicil dated in March, 1797, referring, in *terms*, to his *will* (not of the *twenty-first*, but) of the *first* of July, 1792. The Court (a) said, "If the codicil of 1797 refer to the former will, and not to the latter, it revives the former. In the case of Lords Walpole and Cholmondely, it was held, that parol evidence was inadmissible to shew, that the testator *intended* by his codicil, in which he referred to his last will of 1752, *not* to republish that will, but to confirm his *real* last will of 1756; there being no latent ambiguity (b) as to which of the wills it referred to, in the codicil itself. In the present case, however, there is some ambiguity, in the codicil itself, as to this point; for it refers, in terms, to a will of the ~~1st~~ 1st of July, 1792, and there is no will of that precise date extant. But here, in the first place, I must observe, it is much more probable, that the deceased should have written the "1st of July, 1792," in

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(a) Sir William Wynne.

(b) It was contended (in error) and successfully, that any supposed ambiguity could only arise from the fallacy of considering a "last will" to be a "will made last, in point of time;" whereas "wills" and "last wills" are synonymous, and the general meaning of term "last will" is, that will which is to be operative at the testator's death. It was said, "suppose the devisor had referred to his "will," dated in 1752, without adding "last" to it, there could have been no ambiguity. And the addition of the word "last," does not create any, because "will" and "last will," are synonymous.—See 7 Durnford & East, 138.

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error for the 21st of July, 1792," than that he should have written the "1st of July, 1792," in error, for the "18th July, 1796." The codicil is written somewhat inaccurately, and bears date only a short time before the deceased's death. It agrees with either will in its contents, but it was formed in conjunction with neither of the two; it is possible, therefore, and indeed to be presumed, that the deceased had neither of the two wills before him when he drew up this codicil." The Court then went on to state and examine the circumstances of the case, as disclosed in the evidence, for the purpose of determining to which will it was most probable that the codicil should refer; and having arrived at a conclusion, that it was to be referred, with much greater probability, to the will of 1792, than to that of 1796, it proceeded finally to pronounce for the will of 1792, in conjunction with this codicil, and against the intermediate will.

Here, then, is a case directly in point, and under the authority of that case, I proceed to consider whether this codicil is to be taken *as a* codicil to the will of 1814, or to that of 1817; and I shall have no hesitation in pronouncing for it in conjunction with that will of which it is to be taken *as a* codicil, although this should be the prior will in point of date, or the will of 1814, not that of 1817.

Now, upon a full review of the case, what possible doubt can exist of the intentional, as well as actual, annexation of this codicil by the deceased, to the will of 1814, and not to the will of 1817? And, first, as upon the face of the several instruments, and without having recourse to *extrinsic* evidence.

And here, in the first place, is the circumstance of *actual* annexation—it is annexed to the will of 1814, in point of fact; it is written on the very instrument itself. Why this circumstance, as observed by the First Commissioner Eyre, in the case of *Barnes v. Crow*, is powerful to shew, that it was intended *as* a codicil to the will of 1814, and to no other will. It is headed, “a codicil added to my will;” and begins, “Furthermore it is my will,” &c. Could this be meant of any other will than that upon which it was written? A casual inspection even of the two instruments, will render it evident that any *mistaking of the* one will for the other by the deceased, at the execution of the codicil, was hardly possible. The codicil is written towards the bottom of the third side, or sheet, of the one instrument, the will of 1814. On the upper part of that sheet were, fairly and legibly, written, not only his own signature, but the subscriptions of the three attesting witnesses; at the head of them, that of his confidential solicitor, Mr. Worsley, written in a large character. Why the deceased, when about to execute this codicil, could hardly fail to perceive that he was going to execute a codicil written upon Mr. Worsley’s will, namely, the will of 1814, and not written upon the other will, that of 1817, which has no external resemblance to the former—as being written on one side of paper only, and with much darker ink, and which was subscribed by three persons, with whose names the deceased could not be familiar, as it does not appear that he ever saw either of them, but upon the single occasion of their attesting his will. Added to this, I may just observe, that it is an admitted fact in the

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cause, that the will of 1814 was constantly in the deceased's possession; that the will of 1817 was taken, and kept possession of, by Pittis, and was never in the deceased's custody, or under his controul, for a single day. Lastly, the contents of the codicil agree with those of the first will, and those of the first will only; for the furze-house, bequeathed to Vesey by it, is plainly an adjunct to the cottage, opposite the deceased's house, on Brook Green; the bequest of which cottage to Vesey, by the will of 1814, is revoked by the will of 1817.

Now, I very strongly incline to hold what has been forcibly argued by one of the counsel, that nothing in the shape of what he has termed mere inferential evidence could avail, to counterweigh these strong presumptions, growing out of the instruments themselves, that the deceased meant this as a codicil to the will of 1814, and not as a codicil to the will of 1817. But mere inferential evidence is all that has been attempted to be adduced by way of countervailing those presumptions. For what in substance is the case set up by Mr. Pittis, the party upon whom, I must observe, the burthen of proof is clearly imposed by the circumstances of the case. It is this: the deceased's augmented regard and affection for him, and his family; his diminished regards, and alienated affections, to, and from, his other nieces. Upon this shewing, this Court is asked to *infer*, that the deceased could not mean to revoke a will by which he had given the whole of his property to Pittis, and to revive one in which it stood bequeathed equally to Pittis and the other nieces, and upon this inference, it is further asked to pronounce for the will of 1817.



I entertain, I repeat, strong doubts whether this inference, if ever so fairly raised, could enable me to arrive at any such conclusion as that which is prayed; and, in this view of the subject, it is perhaps unnecessary to travel further into the circumstances of the case. But I am unwilling to pass them over altogether, as being of opinion that, upon the result of the whole evidence, no such inference as that contended for on the part of Mr. Pittis, is fairly raised.

Stephens, the deceased, was an opulent farmer, living at Brook Green, in the Isle of Wight; he was about sixty years of age, and of reserved habits, and suffered much from illness, being severely afflicted with rheumatism. During his brother's life he principally managed the deceased's concerns; but on the death of his brother, which preceded his own about ten or eleven years, the management of the deceased's business, and property, fell, considerably, into the hands of Mr. How, a neighbouring yeoman, and much in his confidence, who appears to have served parochial offices for him, and, in brief, to have done him a variety of kindnesses. The deceased himself was so indolent, as, during his brother's life-time, hardly ever to have gone to Newport, the nearest market town; and it seems that he had not been there for the last four or five years of his own life.

The deceased had made a will in the month of November, 1813, disposing of the bulk of his property, in a manner precisely similar to that in which it was disposed of by the subsequent will of 1814, before the Court, namely, to, and equally between, his three nieces. He bequeathed by that will, an

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annuity of 50*l.* as well as his household goods and plate to his old servant Vesey, and appointed a Mr. New and Pittis, his executors.

In July, 1814, the deceased made a new will, being the one of that date propounded in this cause. His sole object in making it, as spoken to by Mr. Worsley, his solicitor, was to leave, in addition to his former bequests, the cottage on Brook Green, already mentioned, to Vesey, and to substitute Mr. Howe for an executor, in the room of Pittis.

Now, from these alterations two inferences necessarily arise; the one, that the deceased's regard for Vesey was increasing at this time; the other, that his confidence in Pittis was diminishing, for Pittis is displaced from the executorship, and How, as I have already said, is substituted in his room. In these testamentary intentions, however, the deceased appears to have persisted for nearly three years, till the 4th of June, 1817; when he is alleged to have signed the will propounded by Pittis; a transaction to the brief consideration of which I now proceed to apply myself.

On the 4th, then, of June, in the year 1817, Mr. Pittis applies (not to the gentleman whom the deceased had constantly employed in that capacity, but) to his *own* solicitor, and instructs him to prepare a will, *as* for the deceased to execute; the purport of that will being to appoint himself an executor, and his wife the sole legatee of the deceased's property, real and personal, with the single exception of a life annuity of 50*l.* to Vesey; a bequest, which it is open to conjecture, was inserted purely for colour, and by way of saving appearances. No time is lost in complying with Pittis's

instructions, which are reduced into a will on that very morning; and Pittis himself is the person who conveys it to the deceased for execution. The attesting witnesses are neither friends, or neighbours, of the deceased, nor any persons casually at hand; but Pittis sends into the country, a distance of ten miles, for two of his own labourers, and his brother's shopman, for the express purpose of attesting the execution. Vesey, the deceased's old confidential servant, his faithful housekeeper, is left wholly in the dark as to the nature of this transaction—whether it is a will, or a bond, or what it is, that her master is to execute in the presence of these witnesses, she is kept in utter ignorance of. The will itself is not read over to the deceased, in the presence of any one of these witnesses. Pittis is the person all along closetted with the deceased—and how *he* represented the matter to him—what he said, or did not say, what he did, or omitted to do—is matter of mere conjecture. He might have read over the will to the deceased, but there is no proof that he did. The witnesses are then introduced: one of them speaks to hearing the deceased desire them to come in, and “witness the execution of his *will*:” one other says, that he “*appeared* to be reading over *the* instrument (not specifying its nature) which he subsequently executed,” and that “he put it down, and said he was satisfied with it.” Other than this there is no proof that the deceased knew that the instrument, which he was about to execute, was a will; still less is there any proof that he knew what were its contents. The formal execution then takes place.

Observations undoubtedly might be made upon

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the face of that execution ; it might be fairly questioned whether it was, or was not, *such* an execution as would amount to a revocation of the will of 1814, under the statute of Frauds. But I conceive that they are wholly uncalled for, and consequently that they would be out of their place, upon the present occasion. It is quite sufficient for any purpose with which I am considering the transaction in question to state, that it is one, in my judgment, of a very unsatisfactory, and of a very unexplained character. True it is, that agents of unimpeached capacity are *presumed* to be aware of the contents of instruments which they execute *de facto* ; and the agents capacity, in the present instance, *is* unimpeached ; so that the proof of the *factum* of this instrument might, *probably*, be deemed sufficient. Still the circumstances which I have already stated (aided by others to which I shall presently advert) must, I think, be admitted to throw much of suspicion and doubt upon the transaction, although, *perhaps*, they do not operate to the extent of invalidating it (a).

It is first however the duty of the Court to notice a part of the history of this transaction, which it does not see without regret. I allude to the conduct, as deposed to, of the solicitor who prepared this will, which the Court must not pass over in

(a) It remains however to be stated, that a jury, on the trial of an ejectment, at the Summer Assizes (for Hampshire) 1822, found *against* this will. It was necessary, on the part of Mrs. Rogers and Mrs. Browning, to submit the validity of that will to a jury, as the codicil of 1820, being executed in the presence of only *two* witnesses, neither revived the will of 1814, nor consequently revoked that of 1817, so far as respected the deceased's real estate.

silence, painful as it always is to express itself dissatisfied with the conduct of any professional gentleman, in whose office a will has been prepared, to which its attention is judicially called. The solicitor who drew up this will took the instructions for it from the party whom it purported principally, if not solely, to benefit—of the deceased's testamentary intentions he had no *constat* but from these instructions, and of his state and condition, either of mind or body, he could know nothing, but from the representation of the same interested party. He himself had never seen the deceased but once, and that five years before. Surely all this was enough to excite a feeling of caution on his part. So far however from having been actuated, apparently at least, by any such feeling, his conduct was precisely that which, if this transaction *was* fraudulent, afforded it every imaginable facility. He not only prepares the will without any communication with the testator, through Pittis's sole agency, but, when prepared, he delivers it to Pittis for execution, without proposing to satisfy *himself* as to the testator's capacity and volition, either in person, by an agent even, in whom he reposed trust and confidence. So ignorant however are the parties *likely* to be present, considered, of the proper mode of conducting a business of this description, that I can still trace, written in pencil on the instrument, so written, I must presume, in the solicitor's office, a direction to this effect—"Write name against the seal." Now the Court is willing to, and does hope and believe, that all this has proceeded from a mere want of due caution and consideration on the part of the solicitor—from a too blind confidence in the

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integrity of his client Mr. Pittis—That confidence may have been perfectly well-founded—the whole transaction may have been fair throughout, in all its parts—still this does not exonerate from blame the solicitor, with whose conduct in the business I *must* express myself dissatisfied, not, most undoubtedly, for the sake of giving pain to this individual, but for that of admonishing professional gentlemen *generally*, that where instructions for a will are given by a party not being the proposed testator—*à fortiori* where by an interested party—it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity—or, in other words, that the instrument expresses the real testamentary intentions of a capable testator—prior to its being executed, *de facto*, as a will at all.

Assuming then that, for some or other inscrutable reasons, the will of 1817 was approved of by the deceased—that it was executed by him as a will, with a full knowledge of its contents, and with a perfect intention to give it effect—still it is a most remarkable circumstance, that the sole trace of any abandonment of the will of 1814 is to be found in the insulated act of the will 1817. I call it an insulated act; for, abstract the transactions of a single day, the 4th of June, 1817, out of the history of this case, and there is not a vestige of any dissatisfaction conceived by the deceased with the bequests of the former will, of any intention expressed by him to adopt the provisions of the latter one. The transaction rests wholly upon itself for support; it derives none from any thing that preceded; it de-

rives none from any thing that ensued upon it. There is no previous declaration as of intention to make the will of 1817—there is no subsequent reference to, or recognition, of that will, when it is made—there is not a vestige in the evidence of any diminished affection for the other nieces—of any increased regard for Mrs. Pittis—of any disgust at the conduct of Vesey, towards whom I have always said his esteem was increasing in the interval between 1813 and 1814—of any restored confidence in Pittis himself—his confidence in whom, as I have also said, was decreasing during the same interval. The change of disposition is wholly unaccounted for; consisting, not only in displacing the other nieces, and giving all to Mrs. Pittis, but in the re-substitution of Pittis for How as an executor; and in the withdrawing of a part of his testamentary bounty from Vesey, to benefit whom, in a greater degree, was the deceased's principal object in substituting the will of 1814 for that of 1813; whereas, this will of 1817, purports to place her in a worse situation than that in which she stood under the will of 1813 itself. Subsequent to the execution of the instrument, and its delivery to Pittis, not only no *allusion* to its existence, for aught that appears, is ever made by the deceased; but there is nothing in the conduct, either of the deceased, or (which, perhaps, under the circumstances, is full as remarkable) of Pittis, from which its existence can be fairly inferred. Pittis's condition was that of a man *going down*, as it is called, in the world; his circumstances were declining, not possibly from any fault of his own, but from the burthen of a large family, and the pressure of various untoward incidents, which finally,

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in the year 1819, produced his emigration to America. It is in evidence, that the deceased neither advised, nor approved of this measure. Is it in evidence that he endeavoured to prevail with Pittis to abandon it, by reminding him of this will? Was Pittis's voyage to America retarded (prevented it certainly was not) by any anticipation of the great benefit which he was likely to derive under this will at the death of the deceased? There is not a tittle in the evidence from which any thing of the sort can be conjectured. Subsequent, therefore, I repeat, to its delivery to Pittis on the day of its execution, there is nothing to shew that either the one or the other party, either in word or in deed, ever alluded to, or acted *as* upon, this will of 1817, in any shape.

Now, under all these circumstances, where is the *improbability*? (for to determine *this* alone has been my object in considering the transaction)—What is there to render it *incredible*? That the deceased should revert to his old testamentary dispositions expressed in the will of 1814, and abandon those expressed in the will of 1817, giving these last credit, that is, for having *once* been his testamentary intentions. As for the deceased's silence with respect to this will of 1817, and every thing connected with it, when about to execute the codicil of 1820, this, I think, may be accounted for in various ways. Possibly, as conjectured, he had forgot the transaction of this intermediate will altogether; possibly, as also conjectured, he supposed that will revoked by Pittis's emigration to America; possibly, a third conjecture is nearer the mark; namely, that he was unwilling to disclose to How that he had ever made a will, displacing him (How) from his executorship—



disinheriting two of his three nieces—and revoking a part of the benefit conferred by two prior wills on his house-keeper Vesey. The whole of this however is mere conjecture, in which it is useless for the Court to indulge itself. But the intire history of this case, as disclosed in the evidence, is so far from evincing to my mind the *improbability* of the deceased doing what, probable or not, the law determines him to have actually done, that I conceive it the most natural, and the most likely step for the deceased to have taken, when his attention was definitively called to the subject of his final testamentary arrangements.

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Lastly, the parol evidence connected with the immediate *factum* of the codicil, removes any doubts upon this head, could any be entertained upon other grounds. Rayner alone (without How) proves, that the will of 1814 alone, not that of 1817, was in the deceased's *mind* at the time of his executing the codicil. He expressly mentions that deceased's saying, that "it was to give Vesey the fuel-house, to be taken over to the cottage." The deceased must in this, as I have already said, have referred to the will of 1814. But Mr. How speaks to having actually read over the will of 1814 to the deceased before he wrote the codicil; so that this gentleman's deposition (if he is not utterly unworthy of credit) renders it as manifest upon the parol evidence as upon the acts done, that the testator *meant* this codicil to apply to the will of 1814.

I pronounce therefore for that will in conjunction with the codicil as prayed by Mrs. Rogers and Mrs. Browning; but I am not of opinion that this is a case which calls for the condemnation of Mr. Pittis in costs.

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**LORD JOHN THYNNE v. STANHOPE.**

In the Goods of the Right Honorable Lady Elizabeth Stanhope.

*(On the Admission of the Allegation.)*

**JUDGMENT.**

**Sir JOHN NICHOLL.**

If a testamentary paper be cancelled, law infers the revocation of it, unless it can be clearly shewn, 1st. that it once existed as a finished will; 2d. that the testator adhered to it throughout in mind and intention, notwithstanding its cancellation.

This is an allegation on the part of Lord John Thynne, the executor, propounding the will of Lady Elizabeth Stanhope, the party deceased in the cause. I am of opinion that the facts alleged, if proved to the utmost feasible extent, would not justify the Court in pronouncing for the instrument set up.

The paper propounded, on the face of it, is clearly invalid. It concludes, "and all that remains of my fortune, after the payment of the above legacies, I leave to Georgiana Stanhope, my beloved sister, making it however my particular request, that a jewel, having belonged to me, be presented to these following persons, as a remembrance or token of my affection for them, viz." Here the paper ends—so that either it never existed in a finished state, or, if it did, the finishing part, contained in a second sheet, (for the concluding words, it is to be observed, occupy the bottom line of the fourth side of a sheet of paper) has been withdrawn, and is presumed to have been destroyed. Now,

As an unfinished paper, and one in its progress to completion, it is quite evident that this paper can never be pronounced for; for the paper bears

date on the 22d day of November, 1818, and the testatrix only departed this life on the 30th of October, 1821, nearly three years after it was written: and no ground whatever is laid in the plea for its completion having been so long postponed by the testatrix, had she been disposed to put it into the shape, and to invest it with the character, of a finished instrument at all. Added to this, it is stated to have been found in an open drawer, thrown aside among loose papers; a situation in which, when a testamentary paper is found, it carries with it, *prima facie* at least, a presumption of abandonment.

It is not attempted however to set up this as an unfinished paper, and one in its progress to completion; but as a finished paper, which has been cancelled, *sine animo revocandi*, by the testatrix, under an erroneous impression, that the law did not permit her, as a *minor*, to dispose of her property by will.

Now it is perfectly true, that, in legal consideration, a will may be cancelled, without being revoked. The cancelling, itself, is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. A will, therefore, cancelled through accident, or by mistake, (as in the instances put by Lord Mansfield, in the case of *Burtenshaw v. Gilbert* (a), and similar ones) is not revoked. On the same principle it was held, by Lord Chancellor Cowper, in the case of *Onions v. Tyrer* (b), that

(a) Cowp. 52. "*Ingaute factum, pro non facto habetur*," is also the express doctrine of the civil law upon this very subject. Vide D. 28. 4. 1.

(b) 1 P. Wms. 345, Reported also 2 Vern. 743, and Prec. Chanc. 459.

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cancelling a former will, on a presumption that a latter, *devising the same lands to the same uses*, was effective, which latter will however proved to be void, was no revocation of the former, so as to let in the heir.

I assent therefore to the general legal position, that the cancellation of a will does not, *necessarily*, infer any intentional abandonment of the dispositions contained in, or, consequently, any revocation of it. At the same time it is obvious that this is the *ordinary* inference, deducible from every act of cancelling. And I may venture to lay down, that in order to bar its application to any particular case of cancelling, two things at least are requisite: first, it must be proved by indisputable evidence that the cancelled paper *once* existed as a *finished* will: secondly, it must be shewn, by evidence equally indisputable, that the testator adhered to it, throughout, in mind and intention, notwithstanding its cancellation. In the absence of either of these indispensable requisites, the ordinary presumption is that upon which a Court of Probate is bound to act.

It remains therefore only to consider, whether the matter of this allegation is such as to afford any reasonable ground of belief, that evidence of the kind described, upon these two points, could be furnished in the present case, should the Court suffer it to proceed by admitting the allegation.

Now, what are the facts stated in the allegation, as applicable to the case in this view of it? The four first articles of the allegation plead, in substance, only the *finding* of the instrument, in the hand-writing of the deceased, after her death, at the

house of her grandmother, Lady Bath, with whom the deceased had been principally resident, in Lower Grosvenor Street. There is no averment even of *formal* execution; and the *actual* execution of the instrument is so pleaded, as negatives the supposition, that any attempt will, or can, be made to produce other evidence in support of it, than what results from a declaration of the deceased, pleaded in the fifth article of the allegation, upon which I proceed to advert,

The fifth article pleads (in substance) that in the month of January, 1821, the deceased, whilst on a visit in Derbyshire, declared to her ex-governess Madam de Montmollin, "that she had *made* her will; and that the same would be found in her writing-box, which box the said testatrix then had with her." And upon proof of this declaration, the Court is to be asked to infer the *factum* of the will.

Now, supposing this declaration to be proved, in the very words of the plea, it furnishes no proof whatever, to my mind, that this paper ever existed *as a finished will*. In the first place, the expression put into the mouth of the deceased, that "she had *made* her will," is extremely vague, and equivocal; and is just as likely to have been applied by the deceased, a young lady of rank in her minority, to an unfinished, as to finished, instrument. But what I should be glad to know is, how the declaration, be its import what it may, could be pinned down to *this particular paper*. I mean, what proof could be furnished that the deceased, in referring to her *will* upon the occasion in question, referred to *this identical will*. The deceased, between the years 1818 and 1821, might have made another

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will; nay, the probability is, that she had actually done so; for Lord John Thynne states, in his affidavit of scripts, that "he (the appearer) has been informed, since the death of the deceased, and which information he believes to be true, that she, the said deceased, *subsequent* to the making and writing her said will," (i. e. the paper propounded in the cause) made some further, or other, will, or wrote some paper of a testamentary nature; but of the contents, or of the date, of such paper, the appearer has no knowledge or information." But to proceed,

The article goes on to plead, that in a subsequent conversation with the same Madam de Montmollin, on the subject of her will, in the month of September in the same year, when the testatrix was again upon a visit in Derbyshire, she the testatrix declared, that being nearly of age, and "having a doubt whether her will, if made previous to her attaining her age of twenty-one years, would be valid, she had destroyed it;" and added, that, "upon attaining her age of twenty-one years, she would make another will." And it is upon the evidence of this *further* declaration, that the Court is to be required to infer that adherence of the testatrix to the cancelled paper, in mind and intention, which will authorize the Court to give it the sanction of its probate.

I could certainly comply with no such requisition. In the first place, I could have no proof that this, any more than the former, declaration, referred to this identical paper. But, secondly, and principally, admitting that it referred to it, I could by no means collect, from the declaration, that perfect adherence of the testatrix to the paper, throughout,

to every part of it, which alone could justify me in departing from the ordinary presumption of abandonment furnished by the act of cancellation. The reason which the deceased is made to assign for having destroyed the paper—namely, her doubt as to its validity—is rather a singular reason—admitting it however to have been her reason, *non constat*, that it was her *only* one. She had given away, in legacies, *more* than the amount of her property; and *that* might have operated with her as a reason for destroying it. Allowing it, *ex hypothesi*, to be fully proved, that the deceased intended “to make a new will”—*non constat*, that it was to be a will of precisely the same tenor and effect as this, presuming *this* to have been that will referred to by the deceased, as the one which she had destroyed. Any person, much more a young lady, at the deceased’s time of life, may be supposed to have varied, or departed altogether from testamentary intentions once held, in the course of three years, without any stretch of probability.

With this impression of the case I consult the interests of all parties, in staying these proceedings *in limine*, by rejecting the allegation; holding the facts pleaded insufficient to sustain this paper, as they will neither show, that this very instrument ever was a *finished* will, nor that it was cancelled by the deceased, *sine animo revocandi*.

Allegation rejected.

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STEADMAN v. POWELL.

Probate of a will refused to the executor as being the will of a married woman, and consequently invalid in law. Administration of her effects committed to her husband, whose interest, as such, had been denied by the executor. A marriage, in Ireland, between the parties, held to be proved by circumstantial evidence. Its alleged nullity, on account of its celebration by a Popish priest, held to be not proved.

**MARGARET STEADMAN**, otherwise Powell, died on the 22d of March, 1820, having been, for nearly forty years preceding, with the exception of the last fifteen months, in the service of her Grace the Duchess Dowager of Rutland. At the time of her death she was in possession of personal property to the value of about 1500*l.*, accumulated by savings from monies of her own acquirement, in the Duchess of Rutland's service; which monies, as she acquired them, the deceased had been in the habit of investing in the purchase of stock in the public funds, in the name of her brother, Mr. George Steadman (party in this cause).

The deceased left behind her a regularly executed will, bearing date the 2d of October, 1819, in which will she *described* herself, as "Margaret Steadman (otherwise Powell), spinster;" and the will is so *signed*. She had passed, however, for the last five-and-thirty years of her life, by the name and title of Mrs. Powell; and appears to have considered herself, and was universally reputed, the lawful wife of James Powell, (the other party in the cause) until within about two years of her death. From that time it is to be inferred that the deceased considered herself as a *feme sole*, in consequence of having obtained something in the shape of a legal opinion, against the validity, in law, of a marriage, had under the circumstances then stated by her to have accompanied her marriage, in fact, with her reputed



husband. Under this impression, believing herself at liberty to dispose of her property by will, she made and executed two wills, successively; the first, bearing date the 4th of May, 1818; the second, on the 2d of February, 1819, being the will already mentioned.

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Some months after the death of the deceased, on probate of that will being applied for, by Steadman, as one of her executors, a caveat against the same passing, was found to have been entered, on behalf of Powell, alleging him to be the *lawful husband of the deceased*. His interest, as such, being denied by the executor, was propounded in an allegation, which pleaded (in substance) that the parties had been duly and lawfully married, in Dublin, some time in the latter end of the year 1786, according to the rites and ceremonies of the church of Ireland, as by law established; together with cohabitation, the birth of issue, and the general reputation of their being husband and wife from that time. A responsive allegation on the part of the executor, pleaded merely, first, the statute 19 Geo. 2. c. 13. Irish, enacting, “*that every marriage celebrated after the 1st of May, 1746, between a papist and any person who hath been, or hath professed himself to be, a protestant, at any time within twelve months before such celebration of marriage, or between two protestants, if celebrated by a popish priest, shall be null and void, to all intents and purposes, without any process, judgment, or sentence of law whatsoever;*” 2dly, *that Powell and the deceased respectively professed themselves to be, and were, respectively, at the time in question, protestants;*

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3dly, that their pretended marriage in question, was celebrated by a popish priest.

This cause was argued, and stood for sentence, upon the evidence taken in support of the facts stated in these several allegations.

## JUDGMENT.

Sir JOHN NICHOLL.

This, in substance, is an issue purely matrimonial, although it occurs in a testamentary suit. The point in issue is simply, whether the party deceased, who is described, and who describes herself as Margaret Steadman, otherwise Powell, died a *feme sole*, or the lawful wife of James Wakeford Powell. In the former event, the deceased has died testate, and probate of her will is to be granted to George Steadman, the brother of the deceased, and an executor named in her will, the one party in this cause. As a married woman, it is not suggested that the deceased had any authority to make a will—consequently, in the latter event, her will, so styled, is a mere nullity, and the administration of her effects is to be committed and granted to Powell, her husband, the other party in the cause.

The interest of Powell, the alleged husband, has been denied *generally*, by the *executor*, and is propounded in an allegation which has been given on his behalf pleading him to have been “duly and lawfully married to the deceased in Dublin, sometime in the latter end of the year 1786, according to the rites and ceremonies of the church of Ireland”—together with cohabitation, birth of issue, and general reputation from that time downward. An allegation has also been given, on the part of the *executor*, which pleads, first, that marriages in Ire-

land between papists and protestants, or between two protestants, are absolutely null and void, if celebrated by a popish priest, under an Irish act of parliament—secondly, that Powell and the deceased were protestants respectively when married, as pretended, and were married by a popish priest; and, consequently, that such their pretended marriage was and is null and void to all intents and purposes.

Upon the face of the pleas and proceedings, two questions present themselves, first, whether these parties were married at all; secondly, whether, being so, they were lawfully married—a point, indeed, to which the executors *general* negation of the interest of the alleged husband, as contained in the proceedings, is somewhat narrowed by the shape of his plea. An attentive investigation, however, of both questions, is due to the justice of the cause, and may be convenient, for a reason which will presently appear, that the Court should address itself to these questions separately; and first, as to the former.

The facts and circumstances of the case, as pleaded and proved, which are applicable to the first of these questions, are, briefly, as follows:—Margaret Steadman, the deceased, was an attendant upon the present Duchess Dowager of Rutland, and accompanied her Grace to Ireland, whither she proceeded, in the summer of 1784, to join her husband the late Duke of Rutland, then in Ireland, of which kingdom he had been recently appointed Lord Lieutenant. Powell, the party in this cause, was at that time in the service of General Finch, one of his Grace's Aid-de-Camps, and living, as such, at Dublin Castle, or the Phoenix Lodge, near

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Dublin, the official residences of the Irish Vice-Roy; so that Powell and the deceased, on the arrival of the latter in Ireland, were members, in a manner, of one family. In the summer of 1786, the deceased became pregnant, as she said, and as it was "*rumoured*," by Powell—on becoming acquainted with which pregnancy, her mistress, the Duchess, refused to continue her in her service, unless as the wife of Powell. It further appears, that Dr. Preston (then or soon after Bishop of Ferns), at that time private secretary to the Duke, interested himself to procure a marriage between the deceased and Powell, at the request of the Duchess—and caused it to be intimated to the latter, through Emerson, a fellow servant, that his marriage with Steadman was necessary to either of the two keeping their places. A fact of marriage between the parties, to say the least, was asserted by themselves, and was generally understood by others, to have taken place accordingly. Nor was this permitted by the Duchess to rest upon the report of the parties, or upon general *rumour merely*—an instrument purporting to be a certificate of the marriage was produced to the Duchess of Rutland, and was shewn by her to the Duke, her husband; who, being satisfied (as it should seem, by inspection of this certificate), that the parties were really married, suffered the deceased to retain her situation in his wife's service. This certificate is pleaded to have been lost or mislaid—it is said, by the Duchess of Rutland, to have been torn or destroyed, as she understood, on the occasion of some quarrel between the parties. It is further proved, that, from and after that time, the deceased was constantly addressed by the name, and treated

as the wife of Powell—that she was permitted by the Duke and Duchess to lie in at the Phoenix Lodge, where she gave birth to a son, who was baptized as her lawful issue by Powell—that, on the return of the Duchess from Ireland, the deceased accompanied her, still as her attendant—and continued in her service, uninterruptedly, until compelled to relinquish it by bodily infirmity, in the month of January, 1819—that, during this whole interval, Powell, and the deceased, acknowledged each other as husband and wife, and were so reputed, and taken by all who knew them—that Powell was under the necessity of living much apart from the deceased, both whilst he continued in the service of General Finch, and when, upon quitting it, he became a king's messenger, in which capacity he was occasionally absent in foreign parts; but that he frequently did, and was permitted, at all times, to cohabit with the deceased, as well at the several residences of the Duchess of Rutland, specified in the plea, as elsewhere—lastly, that the deceased had two other children, the issue of her connection with Powell, born in this country—one (a daughter) in the house of the Duchess of Rutland, in Arlington Street—both of whom were constantly owned and acknowledged, by the parties themselves, to be their lawful issue; were maintained and educated *as* such at their joint expence; and were constantly reputed, and taken *for* such, by their friends, relations, and acquaintance.

Now it appears to me, that this evidence does *sufficiently* establish a fact of marriage between the parties. Its foundation is not the mere assertion of the parties, together with contemporary rumour or

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report, although these, alone, *possibly*, under the circumstances, might justify the Court in inferring a fact of marriage; but a certificate of marriage is *at the time* produced, plainly satisfactory to the parties who suggested the marriage—one, at least, of whom, is to be presumed no incompetent judge of its authenticity—to omit any mention of the Bishop of Ferns, who is to be deemed, in some sort, privy to the transaction, and to have lent it, throughout, the sanction of his countenance. That the certificate in question *was* satisfactory to the Duke and Duchess, is plainly to be collected, as well from the positive testimony of the latter, as from their suffering the deceased to continue in their service, and even to give birth to her issue under their roof—circumstances which can only be ascribed to their perfect confidence in the genuineness, at least, of the certificate, not to say in the validity of the marriage purported to be certified.

The absence of stricter proof of a fact of marriage in the suit is, in my judgment, fairly accounted for, by the time and place, taken conjunctively, when and where the marriage was had. The *locus contractus* shews that such stricter proof may be dispensed with—the lapse of time suggests to the Court the peculiar propriety of dispensing with it in the present instance.

And, first, as, in Ireland, marriages may be had without any celebration *in facie ecclesiæ*, or in the presence of witnesses, it would be unreasonable to deny that a marriage had, in Ireland, may be proved by slenderer evidence than is requisite to the proof of a marriage celebrated in this country. With us, too, in England, subsequent to the mar-

riage act, the proper, not to say the sole, evidence, in this matter, is the register-book—a medium of proof, which, of course, is excluded where the question respects the *factum* of an Irish marriage, at least of this description. The general matrimonial law of Ireland is, what that of this country was prior to the marriage act; and as marriages in England were proveable by circumstantial evidence prior to the marriage act, marriages in Ireland, I apprehend, are proveable by the same species of evidence at this day. If this be so, a marriage of *some* sort is proved in the present case to all intents and purposes—for I can scarcely figure to myself stronger proof of a fact of marriage (at this distant period from the time of its celebration), by circumstantial evidence, than is to be collected from the depositions taken on the husband's plea.

Upon the whole, then, I incline to think that sufficient proof is furnished of a fact of marriage—in furnishing which, the party whose interest is denied, has discharged himself of the obligation which the law imposes upon *him*. The next question is, whether sufficient proof is also adduced of the alleged nullity, the burthen of proving which, I am of opinion, rests with the adverse party—the party setting it up in plea.

I must observe, however, in the first place, that *all* presumption is in favor of the *validity* of the marriage, the marriage itself being once held to be proved. And, first, the presumption of law is clearly in its favour—" *semper præsumitur PRO matrimonio*," being the constant legal maxim upon these occasions. It has been said, indeed, that this being, at best, a secret, or clandestine, marriage, is not

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entitled to that presumption in its favour ; and that the maxim upon which it is claimed for it, only operates upon marriages regularly celebrated. To this position I cannot, exactly, accede. The circumstances under which the marriage was had, suggested privacy as *to the time of celebration*—and the marriage, so far as respected the mere *time of celebration*, certainly was a secret marriage. But though a secret marriage, it was tainted by no character of fraud—it was not a marriage which the policy of the law discountenanced, or one which it either would or could have interfered to prohibit—it was the very contrary of all this. I am of opinion, therefore, that the general legal presumption in favor of this marriage, is not at all rebutted by the mere circumstance of its being kept intentionally secret, to answer a special purpose, as to the precise time at which it was solemnized.

Nor is the general presumption of law the only presumption in favor of the validity of this marriage. A strong presumption in its favor arises from the circumstances under which it was had. All parties must have been anxious that it should be validly solemnized : nor can any ground be suggested why, when a marriage between Powell and the deceased was once determined upon, a mode of effecting it should have been resorted to, in which its own nullity was internally involved.

Such, however, it is asserted, to have actually been, upon the ground of its celebration by a popish priest ; so that it becomes necessary to state and examine the evidence upon which that assertion rests.

The party who has pleaded, and who, as I have



just said, is bound to prove that the marriage was celebrated by a popish priest, has produced not a single witness in support of that part of his plea. The proof is attempted to be drawn from the mouths of the witnesses examined on the adverse allegation, who are argued to have disproved their own case—with what success it remains to enquire.

The only witnesses from whose depositions this inference can be attempted to be drawn, are Mr. Hamilton, the deceased's solicitor, and her Grace the Duchess of Rutland.

Mr. Hamilton deposes to having been sent for in the month of April, 1819, to prepare a will for the deceased, who had then recently quitted the service of the Duchess of Rutland, and was in lodgings in Baker Street. In the course of giving instructions for this will, the deceased consulted Mr. Hamilton how she was to be named, or described, and then stated "that she considered her name Steadman, and that she ought to be described as Margaret Steadman—that she had been married to Mr. Powell in a way that she conceived illegal—and consequently that she deemed such her marriage a mere nullity." On this gentleman, with a view to the guidance of his conduct in the premises, inquiring *how* she was married, the deceased replied "that she was married in a private room, by an old man, whom she was told was a catholic priest, and whom she supposed to be dead—and that he had given her a certificate, but which Mr. Powell had taken from her, and destroyed." This witness deposes precisely to the same effect, in answer to an interrogatory administered by the executor—adding only, that the deceased, on the said occasion, further in-

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formed him, that "no one was present at the ceremony of marriage," and that "the Duchess, with whom she resided (meaning the Duchess of Rutland, but whose name the witness had forgot), wished them (that is, the deceased and Powell) to be married again in a protestant church."

The parts of the Duchess of Rutland's evidence relied on by the counsel for the executor are, briefly, the following :

To the 2d interrogatory the respondent answers (nearly in the language of every other witness interrogated), that she "cannot take upon herself to depose, from her own knowledge, that any marriage was ever actually solemnized between Steadman and Powell, but that she believes such to have taken place." *This* respondent states her own *particular* grounds of belief to be, "the deceased having produced a certificate that such marriage had been solemnized, which she, the respondent, had in her possession, and shewed to the Duke her husband ; at the same time she cannot undertake to depose when, or where the said marriage was had, nor who was or were present, nor what was the name of the person by whom such marriage was solemnized ; nor can she say whether he were a minister, in holy orders, of the church of Ireland, or a Roman Catholic priest ;" but she adds, that "from every thing told her by Steadman, *at and about the time of the said marriage*, she *believes* that it was celebrated by a Roman Catholic priest."

To the 3d and 4th interrogatories the respondent's answers are precisely similar.

To the 5th she deposes, "that she thinks Dr. Preston (who was private secretary to the Duke,

and who appears from her Grace's deposition in chief, and that of several of the other witnesses, to have interested himself in procuring a marriage between these parties) did advise the said parties to be re-married in England." It is only from her so thinking that the respondent can account for a belief, which she admits herself to have entertained, "that the said parties were subsequently re-married in this country, on their return from Ireland."

To the 6th interrogatory she says, that "the certificate of marriage was, as she believes, given by a Roman Catholic priest, being, as she apprehends, the same person who married the parties."

Now this being, as it is, the only evidence against the validity of the marriage, it does not appear to me sufficient, either in kind or degree, either in nature or amount, to establish the nullity contended for.

And first as to its nature, and the source from which it is derived. And here, in the first place, it is evident that the *whole*, be it what it may, is founded upon the mere averment of the deceased herself; whose doubts (entertained or expressed) of the validity of her marriage, after an acquiescence of five and thirty years, are so intimately connected with her wishes to dispose of her property by will, that it is next to impossible not to suspect that the latter may *alone* have suggested the former. It should even seem that these scruples were scarcely indulged, in earnest, until certain schemes of the deceased for procuring, from Powell, a release of his claims upon her acquisitions in the Rutland family, had failed. In a letter which is exhibited in the cause from Smith, a sister of the deceased, evidently

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written with the concurrence of the deceased, to Powell, she writes, "She (the deceased) further requested me to ask you if you would execute a deed of settlement on herself of the property she possesses, so that she may be enabled to dispose of it in any way which will be most advantageous to her present interest, as a married woman is very unpleasantly fettered in that respect." This letter is dated on the 9th of January, 1819. The same is to be collected from the following expressions in a letter, also exhibited in the cause, from the Duchess of Rutland to the deceased, in answer, it should seem, to one from her, requesting her Grace's interference with Powell on the subject of his leaving her the uninterrupted enjoyment and disposal of her property. She says, "I don't know what to say about writing to Mr. Powell, and indeed I don't clearly understand what you wish me to say to him. I certainly think he has no right to take your money; but fear, that if he was to refer it to the law he would have a right; and I do not know how he could be told that your marriage would not hold good here." Again, "I think your *brother* has mentioned to me that Powell had torn the certificate; if so, we might venture to tell him that he could not claim your property; but then your daughter would be illegitimate; therefore, I think that you had better consult your *brother* before I write to Powell. Powell's answer probably would be, that as you have refused his offer to live with him, he thinks he has a right to your money. I hope and trust it is not so; but fear much, that whatever a wife has is her husband's." Again, "I really quite dislike writing to him (Powell), as I could use no argument

of any weight, unless it is by urging, that, as all your little property was acquired by your own exertions in my service, he ought to permit you to enjoy it in peace; the more especially, as you had never been any expence to him. *Perhaps that may be what you wish me to say*; let me know; but consult your *brother* about it, &c." All this is perfectly just and reasonable; but how is it compatible with the writer's firm conviction, or even sincere belief, *at that time*, that the marriage was a nullity? Must not she, in that case, almost necessarily, have taken higher ground? This letter, I should observe, appears to have been written in the October of 1819. It is certainly true, that expressions occur in this very letter from which an inference may be drawn of her Grace having entertained a belief, *all along*, that the ceremony of marriage was performed, and the certificate granted, by a popish priest. It is also true that she has deposed, in her answers to the 2d interrogatory, already recited, to her having entertained that belief in consequence of what was told her by the deceased, *recenti facto*, or *at the time of the marriage*. But is it quite impossible that this witness, deposing, most unquestionably, according to her *then* present impression and belief, but after a considerable interval, may have confounded what was communicated to her by the deceased, at and about the time of the marriage, with other suggestions from the same quarter, at a much later period? when it should seem that the enjoyment of her property, with all its incidents, and the *jus disponendi*, as one of them, was so paramount an object with the deceased, that provided she attained the end, she was not very scrupulous about the means. This, at

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least, is the only way in which I can account for some apparent discrepancies in the evidence of this witness. The hypothesis to which I have ventured to resort solves the whole difficulty.

So much as to the *kind* of evidence adduced, and the source from which it is derived; next, as to its scantiness in point of amount. For what, in truth, does it amount to? Why, to little more than evidence of the deceased having assured Mr. Hamilton (not that she had been married by a popish priest—for she did not venture to go that length—but merely) that she, the deceased, had been *told* that she was married by a popish priest—without any specification of when, where, and by whom told; without one, in brief, of the numerous requisites to stamp upon the communication a character of authenticity. She might be so told, and yet, very possibly, the fact be otherwise; at all events it is not to be contended that her being *told* so, is *proof* that it *was* the fact. In limiting the evidence in favor of the executor to the deposition of Mr. Hamilton, I must not be supposed to have forgotten that of the Duchess of Rutland. I do so, as being of opinion, that her Grace's deposition, taken as a *whole*, furnishes no inference whatever against the force and effect of this marriage.

Lastly, the improbability that a popish priest would have married these parties in the face of a sentence of capital felony (*a*), is a circumstance not wholly to be left out of the account. Is it likely, at any rate, that a priest of that communion would have risked incurring that sentence for any requital

(a) Vide 12 Geo. 1. Ir. c. 3. s. 1. See however 17 & 18 Geo. 3. Ir. c. 9. s. 1.

which these parties can be supposed to have had either the inclination or the means to offer? Something was said, in the argument, indeed, as to the statute imposing this penalty being obsolete, or a dead letter, and never acted upon. But I really do not know how the Court can presume all this; certainly not, how it can venture to found its judgment on any such presumption. *Obsolete* the statute (*a*) could hardly be; for little more than sixty years had then elapsed from the time of its enactment. It was urged again, however, that ministers of the church of Ireland are punishable for celebrating *irregular* marriages; so that a penalty was incurred by a priest of whichever communion this marriage was celebrated, it being at best an *irregular* marriage, though a *valid* one, if celebrated by any other than a popish priest. This is a specious answer to the objection of improbability; but the vast disparity of penalty in the two cases—in the one, a sentence of capital felony, in the other, a mere subjection to ecclesiastical censures—deprives it of any great weight in my judgment. Ministers in this country were liable both to ecclesiastical censures (*b*) and to pecuniary forfeitures (*c*), for celebrating clandestine marriages prior to, and independent of, the marriage act; yet it is well known, that parties here, who were desirous of being married clandestinely anterior to that act, were seldom put to any difficulty for lack of a minister, in spite of these penalties and forfeitures. It is probable that equal facilities

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(*a*) Stat. 12 Geo. 1. Ir. c. 3. s. 1.

(*b*) Canon, 62.

(*c*) 6 & 7 W. c. 6, 7 & 8 W. c. 35. 10 Ann. c. 19,

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in this kind are afforded to parties in Ireland at the present day.

Upon all these several considerations I pronounce for Mr. Powell's interest; and, consequently, that he is entitled to the administration of the deceased's effects as a husband, whose wife, the deceased, is dead intestate in law.

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SCRUBY and FINCH v. FORDHAM and Others.

JUDGMENT.

Sir JOHN NICHOLL.

1. A will partially defaced by a testator, whilst of unsound mind, is to be pronounced for, as it existed in its integral state, that being ascertainable,
2. If a testator of impeached sanity, do some act with relation to his will, whose state of mind, at the time of doing which, there is nothing to evidence, *affande*; his rationality at such time, or the contrary, is to be inferred from what of his act.

The party deceased in this cause is John Trigg, late of Melburn Bury, in the county of Cambridge, who died on the 6th May, 1821. He died a bachelor, without father, leaving behind him a mother, a sister, by the whole blood, and two sisters and a brother, by the half blood; and was possessed of property, amounting, at the time of his death, to between sixteen and twenty thousand pounds.

The testamentary papers before the Court are paper B, the original draft of a will; and paper A, a will or testament itself. This latter instrument is pleaded, and proved, to have been drawn up from the former, and was executed by the deceased, in the presence of three witnesses, with the usual formalities, on the 6th day of June, 1818. He appoints in it seven executors, amongst whom are Thomas Scruby and Charles Finch, the parties now propounding the instrument, *as it existed in its original state, and at the time of its execution.*

For its present plight and condition, (in which it was left by the deceased) are as follows:—A part of the last line of the fourth sheet, and a part of the first line of the fifth sheet, is obliterated with ink; and the upper part of this same fifth sheet, down to the tenth line, is also torn, or gnawn, or otherwise defaced. It is pleaded, and proved, that the passage obliterated with ink ran as follows: “Unto Mr. Thomas Scruby, of Melbourn, the sum of 500*l*.;” and that the several bequests in the upper part of the fifth sheet, down to the tenth line, were—“Unto William Mortlock, Esq. of Meldreth, the sum of 500*l*.; unto Mr. William Scruby, of Malton, the sum of 500*l*.; unto Mr. William Wedd, of Foulmire, the sum of 500*l*.; unto Mr. William Nash, of Royston, the sum of 500*l*.; unto Mr. Charles Finch, sen. of Cambridge, the sum of 500*l*.; unto Mr. Thomas Newbury, of Melbourn, the sum of 200*l*.; unto Mr. Richard Beaumont, of Whaddon, the sum of 100*l*.; and unto Mr. Joseph Dickson, of Litlington, the sum of 100*l*.”

The execution of the will itself, and the capacity of the deceased at the time of execution, are admitted on all hands. It is proved to have been prepared with great deliberation: the bequests contained in it were canvassed, in repeated interviews, between the deceased and his solicitor, Mr. Wedd, of Royston, who drew it up; and the draft was settled by counsel prior to its engrossment for execution. In substance, it provides for the sister by the whole blood, and her family, the more liberally, it should seem, through Mr. Wedd's good offices; it bequeaths legacies to several friends and relations, eleven in number; and it disposes of the rest, and

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residue, comprising a large proportion of the whole property, to *charitable* uses.

To this disposition of his affairs the deceased adhered for nearly three years, and up to the time of his death; unless any thing to the contrary is to be collected from the present plight and condition of his will. It is contended, however, that nothing to the contrary *is* to be so collected. For the case set up is, that the instrument was so, in part, *at least, apparently*, cancelled by the testator, whilst he was of unsound mind, memory, and understanding. And the Court is prayed to decree probate of the instrument, as it originally stood; supplying the blanks caused by these apparent cancellations, from paper B, the admitted draft of the instrument.

It appears, that the deceased and his family were not upon the most amicable terms. His father died when he was an infant; his mother married again, and had a second family. The mother, as administratrix of the father, took possession of a leasehold estate, of considerable value, for herself and her children, which was occupied and farmed, for a series of years, by her second husband. On the deceased becoming of age, in the month of March, 1812, differences arose, *as* respecting that estate; which, being referred to arbitration, produced an award, giving the deceased possession of the estate, upon certain conditions. A bill in Chancery was filed by the one party to set aside this award; and steps were taken in the Court of King's Bench, by the other, to enforce submission to it. It is true that, in this stage of the business, a compromise was effected, through the interference of mutual friends

to the parties, but it is in evidence, that the deceased, from this period, never cordially forgave "*the Fordhams*;" and that his father, and brother-in-law (the husband of his sister by the whole blood) both named Fordham, were the objects of his particular disaffection. I have already said, that this sister was indebted to Mr. Wedd's interposition for partaking so largely of the deceased's testamentary bounty. She, it is, and her husband, who oppose the will, *as propounded*, it being *their* interest, under the will, that it shall be pronounced for in its present plight, rather than in its original state. An appearance has also been given, indeed, for the next of kin, praying an intestacy; but *their* opposition may be taken as, *virtually*, abandoned.

At the time when this will was made and executed, there is no reason to suspect the testator of any intention to marry. But it seems that, for some months prior to his decease, he had paid his addresses to the daughter of a friend, and neighbour, who had consented to be married to him, with the perfect sanction and approbation of her family. Now this circumstance has been taken hold of by the counsel *against* the will, *as propounded*, as laying a foundation for those mutilations apparent on the face of it, for the validity of which they would contend. But in order to determine the force of this argument, it is requisite to consider what these mutilations, in themselves, import; or, in other words, what would be their effect, supposing the Court should incline to pronounce for them, as being of opinion that the testator was perfectly sane, and rational, at the time of their being made. For, if it should appear that these cancellations, at most, could

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operate merely as revocations of particular legacies, and not as a revocation of the whole will, it disposes, at once, of the argument for the probability, *à priori*, of the deceased's being induced to make them, from this circumstance of his contemplated marriage. By the result of this enquiry, will, also, be determined, the propriety, on the contrary, of the parties in distribution, ceasing to contend for an intestacy.

Now, as with respect to this part of the case, I am of opinion that, on the face of the instrument itself, this obliteration, and tearing, could, at most, effect a *partial* only, and not a *total*, revocation of the instrument. Questions of revocation are mere questions of intention—all which rests with the Court, in respect of them, is, to put a rational construction upon the act of revocation. If a testator tear off, or efface, his seal, and signature, at the end of a will, the Court will infer an intention to revoke the whole will; this being the ordinary mode of performing that operation. If a testator, on the other hand, obliterates a particular clause, this, on the same principle, operates only as a revocation *pro tanto*, or, of that particular clause (*a*). So, again, if part of one sheet of a will, consisting of several sheets, be torn off, or cut through, the other sheets, together with the signature, attestation, and so forth, remaining in their original state, this would

(*a*) This also was the doctrine of the civil law. Vide D. 28. 4. 3. Mantica says, "*Ita demum præsumitur testamentum cancellatum, favore venientium ab intestato, quando testator cancellavit vel induxit totum testamentum. Quod si testator solum cancellaverit testamentum in aliqua parte, in aliis partibus non cancellatis, firmum manet.*" *De Conj. Ult. Vol.* l. xii. tit. 1. No. 31.

only revoke the part actually so cut, or torn; and would not enure to a revocation of the whole will. Whether, indeed, any person in his senses, under *ordinary* circumstances, would resort to this mode of *partial* revocation, is another question; but if he did, or must be presumed so to have done, I am of opinion, that the effect could be only that last described. Now these considerations, I apprehend, dispose of the whole argument against the will, *as propounded*, built upon the deceased's intention to have been married. His intention to marry might be ground for revoking his whole will, as preparatory to a new disposition of his property, altogether; but it could be no reason for cancelling particular legacies; the whole effect of this last operation being to swell the residue, which, as well as specific sums to a large amount, stands bequeathed, as I have already said, to charitable uses. The same considerations, by the way, also evince, that the parties in distribution could not have contended, effectually, for an intestacy.

The history of the deceased, as spoken to by the witnesses, is peculiar, and affecting. He is described as "a very clever, sensible, young man, quick and keen in business, of a lively and cheerful disposition, but rather irritable." This is said to have been his "general character," and it continued to be, for any thing that appears in evidence to the contrary, till within a few days of his decease. On the Monday (30th April) preceding that event, he is described by Mr. Wedd, upon whom he had called, at Royston, as "transacting business correctly;" but as evidently labouring under "a great dejection of spirits;" and, in par-

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ticular, as impressed with a notion, for which there does not seem to have been the slightest foundation, that his intended match with Miss H. was "off," as he expressed it; or would never take place. On Wednesday, the 2d of May, the deceased was visited by Mr. Mortlock; and on Thursday, the 3d of May, at his own express desire, by Mr. Wedd; and the depositions of these gentlemen render it obvious that his disorder, in this interval, was still gaining ground. They represent him, on those days, as buried in gloom and despondency, and visited with a number of fancies, the mere offspring of that malady, with the seeds of which he was obviously impregnated on the preceding Monday. He still insisted that his match with Miss H. was "off," assigning as the reason for it, when urged, one which *could* not be true; he complained, that "all his friends turned their backs upon him, and could have nothing to say to him;" he said, that a mere common place letter which he had received, in answer to one enquiring the character of a bailiff, was "ironical," and meant to "banter him;" and that he had been betrayed by the parishioners of Melbourn, at a parish meeting, into "signing a paper, by which he was ruined." These and similar notions, which haunted the deceased's imagination, had no foundation whatever but in his own dis-tempered fancy.

It is not my intention to pursue this melancholy history in detail. It is sufficient to state that the deceased became rapidly worse—and, that during the last three days, at least, of his existence, he was decidedly lunatic. In the course of Sunday, the 6th of May, towards midnight, he escaped from

the persons about him, by leaping from a window of some height, into the garden of his house; and was suffocated in a pool or pond of shallow water, contiguous to the garden, into which he either threw himself, or accidentally fell; possibly, in making his way towards some deeper water, a little further off, for the purpose of self-destruction. Mr. Haines, his medical attendant, speaks to his belief that he was "meditating suicide," on the Saturday, the day preceding.

I shall now briefly advert to those parts of the evidence which respect the deceased's operations upon his *will*, on the particular subject of which it will be seen, that the deceased, although constantly harping upon it, was not a bit more rational than in his general conduct.

Mr. Mortlock, an intimate friend and neighbour of the deceased, deposes, that just as he was about to leave the deceased's house on the morning of Wednesday, the 2d of May, after the visit to which I have just alluded, the deceased followed him, and stopt him, saying, "I want you to take care of a paper, which Joseph Wedd has given me for you." The deponent having asked "what paper Mr. Wedd could have given him for the deponent," the deceased told him, "it was *his* (the deceased's) will; and that he wished the deponent to take care of it for him." The deceased looked for it in the parlour where they were, but could not find it. The deponent told him, that "he could not stop then, but that he would be with him again in the afternoon, and would then take it." In the afternoon, however, of that day, the deceased rode over to Mr. Mortlock's, and remained alone with him

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nearly three hours. Mr. Mortlock represents him as buried in gloom and despondency, which he *now* ascribes to mental derangement, though he did not so consider it at that time. In the course of conversation he repeated his wish, that "Mr. Mortlock should take charge of his will," which, however, he had not brought with him, for the purpose of depositing in his custody, as might have been expected.

In the morning of Friday, the 4th of May, the deceased had a good deal of irrational conversation with his housekeeper, Taylor, on the subject of his will. He repeatedly expressed his fears, that "the Fordhams would get at it," in which case, as he expressed it, "Melbourn" would be ruined (*a*). He wished her to convey it to Mr. Thomas Jarmain's, a neighbour, which she refused. He then persuaded *her* to take charge of it herself, to which at length she consented, and folded it up in one of her gowns, by the express desire of the deceased, where it remained till the evening of that day. She deposes, that "about eight o'clock in the evening, the deceased, who had gone out on horseback, and who, it appears, had dined with Mr. William Scruby, of Malton, his uncle by marriage, returned home, and after being alone some little time in the parlour, rang for the deponent, and desired her to fetch him *that parcel*, which he had given her in the morning, and added, 'I want to put some writing into it,' or 'I have got more writing to put into it,' or to that effect: she went, and fetched

(*a*) The testator had bequeathed by his will 2000*l.* towards the education of poor children living in Melbourn and Mel-dreth, or within six miles of Melbourn.



it to him, and left it with him; he said nothing, that she recollects, when she gave it to him: he remained in the parlour, alone, after that, for some time, she cannot say how long; from half an hour to an hour it might be: he then rang for, or called her, and again wished her to take the will, but she did not like to have it again: he kept worrying her about it, as he had done in the morning, either to take it herself, or to send for her husband and let him take it, to Mr. Jarmain's." This continued till the deceased was diverted from his importunity by the arrival of Mr. Scruby.

Mr. Scruby, who had followed the deceased home, in some alarm, deposes, that "on hearing *his* voice, as he believes, the deceased came out from the parlour, and said, 'he was glad the deponent was come, that he was just setting off to the deponent's house;' he then took the deponent into the parlour, a parcel was lying on the table, the deceased said, 'here is what I was telling you about, what I was going to send to Jarmain's.' He then broke open an envelope, and gave the enclosure to the deponent, saying, 'there, do you take this home with you;' the outer cover which he so took off was addressed, in the hand-writing of the deceased, to Mr. Jarmain; the inner cover which the deceased did not break, but in which he gave the parcel to the deponent, was addressed, also in the hand-writing of the deceased, to the deponent, or Mr. Mortlock; and the deponent put it in his pocket." After some further incoherent conversation, the "deceased ordered his horse, and accompanied the witness home, where he agreed to take a bed. The witness, after supper, attended the deceased to his bed-room,

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where he left him ; and, shortly afterwards, retired to his own bed-room, immediately over that in which the deceased was to sleep ; appointing a female servant to sit up in a room adjoining the deceased's, and to call *him* up if she heard the deceased moving. Accordingly, he had scarcely retired to bed, when he was summoned to the deceased's apartment, whom he found extremely agitated, and insisting on the re-delivery of the ' paper which he had given the witness.' " The witness deposes, that " on giving it him, he broke open the seal, and kept turning the sheets over and over ; he said, ' I scratched my pen over Tom Scruby when I was a little angry with him about the small tithes, but I wish that to be as it was—he has been a very kind friend to me'—nothing would satisfy the deceased, but he would have the will from the deponent, and he had it, as he has deposed ; and then, when he had done with it, the deponent had to get him wax to seal it up again, and he was very particular in sealing it up again." The deponent says, that " while the deceased was turning over the sheets of his will, he stood by the side of the bed, and noticed him—his manner was quite insane—he turned over a sheet, looked at the next, and did not attempt to read it, or any part of it." After the deceased had sealed up his will again, he gave it to the witness, who locked it up in a drawer in the room, and took out the key, and determined on continuing with the deceased during the rest of the night, in the course of which he fell asleep, and slept, till awakened by the deceased. He goes on to depose, that " he left the deceased about six o'clock, and returned about eight, when he found him still in bed." On the

deponent asking him how he did, the deceased answered "how am I? I am a wretch not fit to live, I am a devil—what have I been doing? I have been tearing my will." The deponent, not believing this, having looked it up, and not seeing it about, said, "oh, no!—you have not"—he said "I have"—the deponent said "no, no"—upon which the deceased took it from under the bed cloathes, and casting it before the deponent on the bed, said "there it is"—the deponent turned over the pages, and not, at first, seeing the torn part, said "oh, no!—I don't think you have torn it." The deceased rose up in the bed, and reaching a coat that lay by the side of the bed, put his hand in the pocket, and pulled out some torn pieces of paper, which he gave to the deponent, saying "there it is; I have been gnawing it like a dog—Oh! what a wretch am I, I have been trying to injure my best friends—can it be repaired?" The deponent, to pacify him, told him he had no doubt but it could; the deceased added "only think that I should go to the drawer, and that one of my keys (of which he had several with him) should undo it." The deponent then gathered the pieces of paper which the deceased had given him, and folded them into the will, which he again put into the drawer.

On the Saturday morning, the deceased, still continuing at Mr. William Scruby's, consented to be bled; after which he was apparently quiet, and possibly enjoyed something of a lucid interval for *several hours*. He soon, however, relapsed, and reverted to the subject of his will, insisting on having "*that paper again*." The deponent, not thinking it right that the deceased should have it,

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told him that he had given it to Mr. Mortlock, who had been at the deponent's house in the course of the morning—the deceased, at first, suspected the truth of this assertion, but, on being satisfied by the deponent's assurances, he said “he would go to Mr. Mortlock for it, for have it he would;” the deponent, who “saw the storm rising” as he expresses it, took an opportunity of fetching the will, and dispatching it by Mr. Haines, to Mr. Mortlock; and then, seeing that nothing would satisfy the deceased, agreed to ride with him to Mr. Mortlock. The deceased was very impatient—“they set out together, but the deceased very quickly broke away from the deponent, and rode off at speed.”

Mr. Mortlock deposes, that, “in the afternoon of Saturday, between three and four o'clock, as he best recollects, Mr. Haines came to the deponent's house in great haste, and brought with him the deceased's will—but there was hardly time for him to tell the deponent the occasion of his visit, or for the deponent to put the will in his secretary, when the deponent, looking round on hearing an exclamation from his wife, saw the deceased himself, riding, at speed, to the house; the deceased leaped a chain, came through a narrow way between two posts, where there was scarcely room for a horse to pass, into the garden—jumped from the horse, rushed into the hall, and, knocking down two of the children of the deponent, and pushing aside his wife, came up to the deponent, in a state of the greatest agitation, insisting on having his will. The witness endeavoured to persuade the deceased to leave it in his (the witness's) custody, but the deceased betrayed

such increasing agitation about it, that the witness, by the advice of Mr. Haines, and in order to calm the deceased, at length suffered him to have it. He still, however, pressed the deceased to leave it in his keeping, which the deceased at last said that he would, provided the deponent would let him have some paper and wax to seal it up. The deponent accordingly lighted a candle, and having supplied him with some writing paper, and a stick of sealing-wax, the deceased proceeded to enclose the will in an envelope, and seal it up; this he did with considerable industry, for he sealed it in many places, but in a very few minutes afterwards the deponent heard him *tearing something behind him*; the deponent getting round him, and seeing what he was about, suddenly withdrew the will itself from the cover, which the deceased had torn open, trying, as it seemed to the deponent, to tear the will itself, but without having actually done so. The deceased then tore the cover (which it seems not unlikely that he mistook for the will itself) in pieces, and held them over the candle, burning them, as if he was at play with them; the whole action being one of decided derangement. The deponent (who appears to have used considerable dexterity in recovering possession of the will) then withdrew with it up stairs. The deceased remained at Mr. Mortlock's house till about nine o'clock that evening; between eight and nine, Mr. Mortlock proposed that the deceased should go home, to which he assented, but when the gig came, he could not be prevailed upon to get into it—he put his foot on the step five or six times, and then withdrew it, and returned into the parlour, each time beckoning or calling to the de-

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ponent, who had taken his seat in the gig, to follow him, telling him that he wanted to speak with him alone. On each occasion when the deponent *was* alone with him, he told him, what he wished principally to say was about his will—he asked where it was—the deponent, considering him to be in an unfit state to have it in his possession, told him that he had burnt it—“well then” said the deceased, “can’t I make another?”—the deponent told him that he might—that a man might make a will at any time, &c.—“could not *he* then make another?” he said—“might not *he* make another?”—and in this way he continued, calling the deponent back, and asking what had become of his will, and when told that he had burnt it, asking, over and over again, “whether he could not make another?” At length, however, the deceased was persuaded to get into the gig, and was driven home by Mr. Mortlock to his house at Melbourn. As for the will itself, *that* remained in Mr. Mortlock’s custody, till he delivered up the possession of it to Mr. Wedd, after the melancholy catastrophe of the following evening already alluded to.

Now, in the face of this evidence, it would be idle to contend, that the deceased was sane at the time of reducing this fifth sheet of his will (whether by tearing or gnawing it, *non constat*) to the plight in which it now appears; and I have no hesitation whatever in pronouncing for those legacies, as part of that will, which are proved to have stood at the top of this fifth sheet, when in its integral state.

To the obliteration with ink, of the legacy of 500*l.* to Mr. Thomas Scruby, in the bottom line of the fourth, and top line of the fifth, sheet of the

will, different considerations apply; and this, indeed, is the only part of the case upon which the Court has felt, all along, any sort of difficulty. The ground of distinction between this, and the other part of the case is, that it is impossible to ascertain the precise time at which the obliteration was made. It might have been made at any time within ten or eleven months before the deceased's death—for the deceased, as I shall presently observe, is proved to have had the will *so long* in his possession or custody, though for nearly the two years next after its execution, it had remained in the hands of Mr. Wedd. But, on the other hand, the high probability is, that it was effected on the Friday evening preceding his decease, at which time he was, decidedly, insane. On that evening it is proved, by Taylor's evidence, to which I have already adverted, that the deceased was alone, with the instrument before him, for from half an hour to an hour, for the express purpose, as he assured the witness, of "putting some writing, or putting some more writing into it." It should seem from the deposition of the same witness, that the deceased had an equally apposite occasion of performing the operation on the same Friday morning, for he, probably, had been busy with his will, prior to his dispatching Taylor for a candle and sealing wax for the purpose of securing it in an envelope, as she speaks to his having done, on the morning of that day. Be this, however, as it may, to the morning, or the evening, of that Friday, I am clearly of opinion, that this obliteration is, with far the greater probability, to be referred.

Still, however, it must be admitted, that the

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Court has no direct evidence of the time, or, consequently, of the deceased's state of mind at the time, of the act done. It must have recourse, therefore, to the usual mode of ascertaining it in such cases—which is, by looking at the act itself—for this I take to be the general rule, where a will is traced into the hands of a testator, whose sanity is once fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to that will, there is no direct *constat*. In other words, the agent is to be *inferred* rational, or the contrary, in such cases, from the character, broadly taken, of his act.

Applying, therefore, this test to the present question, I am led to consider, whether the obliteration of this legacy of 500*l.* to Mr. Thomas Scruby, under all the circumstances, were a rational act in itself—and whether it were rationally done, and performed, as to the mode of obliteration resorted to by the deceased. Now I own that I can bring myself, *exactly*, to neither of these conclusions.

And, first, how was the act done or performed? If a person of sound mind was about to revoke a legacy, he would probably erase it, or strike his pen through, or draw lines across it; and, if a person of only ordinary caution, he would note the revocation in the margin, accompanied with its date, and authenticated by his signature, or the initials of his name. Has any thing of the sort occurred in this instance? The mode of obliteration appears to have been this:—The testator appears to have let drops of ink fall on the passage from the quill part of a pen, and then to have smeared it over with the feather end; and that so incautiously, as in part to



efface, at the same time, his own signature at the bottom of the fourth sheet. Now this is hardly a sane mode of obliteration. It is observable, too, that the testator has suffered the phrase, "my *eleven* last mentioned legatees," to stand at the very foot of this obliteration, though, if valid, it reduces the number to *ten*; and that the name of Mr. Thomas Scruby is left as an executor, though it is purported to be struck out as a legatee.

Nor, secondly, can I quite be of opinion that the act itself, independent of the mode of action, is perfectly rational: it is so far, at least, irrational as to be capable of no *assignable* reason, which, perhaps, *under the circumstances*, is all that is required. It has however been attempted to be shewn, that something of a reason did exist for the testator altering his mind as to Mr. Thomas Scruby's legacy; and to this end interrogatories have been addressed to, I believe, all the witnesses, as to a misunderstanding which is supposed to have occurred between the deceased and Mr. Thomas Scruby, *subsequent* to the making of the will. Now, in the first place, it is not quite clear whether this misunderstanding did not occur *prior* to the execution of the will; but, be that as it may, this at least is certain, that any coolness which it might have occasioned between the parties had subsided, long before the deceased ever had this will in his possession. For it appears by the evidence of nearly all the witnesses, that the difference in question (as to the origin of which, too, the deceased had the candour to admit himself in the wrong) occurred in the spring of the year 1818, and that it lasted, as one of the witnesses expresses it, "a very little while." And it is mani-

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fest by the deposition of Mr. Wedd, that the will was in *his* custody from the time of its execution till the month of May or June, 1820, when it was delivered to the deceased by Mr. Wedd (of his own mere motion, and not at the request of the deceased, as for any purpose of alteration or cancellation) only ten or eleven months prior to the death of the deceased.

And this last piece of evidence, by the way, nearly disposes of the argument, derived from what has been termed the deceased's "*recognition*" of the obliteration, contained in his declaration, already stated, to Mr. William Scruby, that he had "*scratched his pen over Tom Scruby when he was a little angry with him about the small tithes.*" Supposing, however, that the deceased's averment on this head had not been erroneous on the face of it, as it plainly was, still the Court could scarcely have ventured to build any superstructure on the foundation of what fell from a man, in the state of derangement which the deceased is proved to have been in at the time of making this supposed "*recognition.*"

Upon the whole, then, the Court has reason to be satisfied that the testator was of unsound mind, memory, and understanding, at the time, as well of cancelling this legacy to Mr. Thomas Scruby, as of defacing the bequests at the top of the fifth sheet of his will; and I have no hesitation in pronouncing for the will, as it originally stood, in both respects.

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**STANHOPE v. BALDWIN, otherwise GOSSTER,
falsely called STANHOPE.**

AUGUSTUS Henry Edward Stanhope, the natural and lawful son of the Earl and Countess of Harrington, was born on the 25th of March, 1794, and was baptized, on the 14th of May following, by the aforesaid names of Augustus Henry Edward. On the 8th of May, 1813, at the age of little more than nineteen, he was married to Jane Baldwin, otherwise Gosster, in the parish church of St. John, Hampstead, by virtue of banns, in which he was described as "Edward Stanhope" only. This was a suit, instituted by Mr. Stanhope, to annul his marriage with his said wife, by reason of such (undue) publication of banns.

A marriage
annulled by
reason of an
undue publi-
cation of
banns, under
26 Geo. 2.
c. 33.

On the part of Mr. Stanhope it was pleaded and proved, that at all times, from his baptism, he was called and known by the name of Augustus, to the intire exclusion of the names of Henry and Edward. These last, indeed, were so completely dormant, that even his nearest relatives, and most intimate friends, were ignorant that he had any other christian name than that of Augustus. It was further pleaded and proved, that the said marriage was had without the consent or knowledge of Lord Harrington; and that, in order to conceal it the more effectually from Mr. Stanhope's friends, the parties

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had been married in disguise—Mr. Stanhope having assumed, on that occasion, the dress of a groom, or labouring man, and the lady that of a maid servant. It was also in evidence, *that* Lord Harrington did not become acquainted with his son's marriage for more than two years afterwards; at which time his said son had attained his majority—that Mr. Stanhope had been resident abroad nearly ever since his marriage—and *that* he had only recently ascertained that proceedings could be instituted, with a prospect of having the marriage declared null and void.

The Judge (Sir CHRISTOPHER ROBINSON)

Was of opinion that the ground of nullity charged was fully sustained; and that, even if the variation did not go *intirely* to disguise the identity, which he was inclined to hold, still that he was bound, under the circumstances, to pronounce a sentence dissolving the marriage (*a*).

(*a*) See the principles which governed the decision of this case, laid down in the case of *Pouget v. Tomkins*, 1 Phill. 490.

It is to be observed, that the statute 3 Geo. 4. c. 75, commonly called the New Marriage Act, does not render good, and valid, marriages had by banns, prior to the passing of the act, such marriages being, in themselves, null and void by reason of undue publication of banns—but only such as, being had by licence prior to that period, were, in themselves, null and void by reason of minority and want of legal consent. A marriage therefore prior to the 1st of September, 1822, [vide s. 21. of the act] had in virtue of banns unduly published, is still a nullity; and must be so pronounced, upon proof made, in a suit instituted for that purpose. But it is provided by the act [s. 19 & 21], that no marriage had by banns, from and after the 1st of September, 1822, “shall be avoided, on account of the true name, or names, of either party not being used in the publica-

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tion of such banns; but it shall be lawful, in support of such marriage, to give evidence that the persons, who were actually married by the names specified in such publication of banns, were so married; and such marriage shall be deemed good and valid, to all intents and purposes, notwithstanding false names, or a false name, assumed by both, or either of the said parties, in the publication of such banns, or at the time of the solemnization of such marriage."

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IN THE COMMISSARY COURT
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DEAN AND CHAPTER OF WESTMINSTER.

The Office of the Judge, promoted by CLINTON
v. HATCHARD.

"Chiding and brawling in a church," penalty of, under 5 & 6 Edw. 6. c. 4.

No person can be a lecturer, although elected by the parishioners, without the rector's consent—unless there be an immemorial custom to elect without his consent.

THIS was a proceeding by articles against Henry Hatchard, of the parish of St. Margaret, Westminster, at the promotion of the Rev. Dr. Charles Fynes Clinton, prebendary of the collegiate church of St. Peter, Westminster, and incumbent curate of the said parish. The articles, after pleading, first, the *general* law touching the orderly demeanour of persons who repair to their parish churches; and, secondly, that part of 5 & 6 Edw. 6. c. 4, which respects *quarrelling, chiding, or brawling*, in any church, went on to charge, *that* the said Henry Hatchard did, in the afternoon of Sunday the 10th of December, 1820, whilst at the church of St. Margaret, Westminster, and during the celebration of divine service therein, behave in an irreverent and disorderly manner, and annoy and interrupt, the Rev. William Johnson Rodber, assistant curate of the said parish, whilst he was passing from the vestry-room to the pulpit, and endeavour to prevent him from preaching a sermon therein—*that* he, the said Henry Hatchard, in order to effect his said purpose, had caused, or induced a number of persons to collect about the vestry door, by shouting, in a loud tone, "We want some friends about the

vestry-room door;" so that the said Rev. William Johnson Rodber could, with difficulty, effect a passage from the said vestry-room to the pulpit—*that*, during the said Rev. William Johnson Rodber's passage from the said vestry-room towards the pulpit, the said Henry Hatchard took hold of his gown, and, addressing himself to him, said, "Here is Mr. Saunders, ready to do his duty; why won't you let him preach?"—*that* upon the said Rev. William Johnson Rodber's disengaging his gown, and still proceeding towards the pulpit, he, the said Henry Hatchard, followed him, repeating the word "Shame;" and adding, in an angry, chiding, and reproachful manner, "For shame, Mr. Rodber; Mr. Saunders was regularly elected—why not let him preach? For shame"—and *that*, by such irreverent and improper conduct, he, the said Henry Hatchard, greatly annoyed and disturbed, as well the said Rev. William Johnson Rodber in the performance of his duty, as the congregation then assembled in the said church, for the purpose of divine worship.

A responsive allegation was given, and admitted, on the part of the said Henry Hatchard, which pleaded, in substance, *that*, in the autumn of the year 1820, the afternoon parochial and unendowed lectureship of the parish of St. Margaret, Westminster, having become vacant, the Rev. Isaac Saunders, Rector of St. Ann's, Blackfriars, was chosen lecturer, against several competitors, by a majority of parishioners, at a poll taken by the churchwardens on the 6th, 7th, and 8th of December in that year—*that* it being *doubted*, during the said election, whether Dr. Clinton, the incumbent, would grant Mr. Saunders the use of the pulpit, if elected, much

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curiosity was excited among the parishioners to know the result, which led to the assemblage of an unusual number of persons at the afternoon service, at St. Margaret's, on the ensuing Sunday, being the 10th of December—*that*, among others, the said Henry Hatchard went, and arrived there towards the conclusion of prayers; and having learnt, upon his arrival, that the said Mr. Saunders was in the vestry, he went thither to inquire whether he was, or was not, allowed to preach—*that* being answered by that gentlemen in the negative, he withdrew from the vestry into one of the aisles of the church, where, having learnt, soon afterwards, from one of the beadles, that the said Mr. Saunders had retired into the church-yard, upon the vestry being cleared, he also went there, and found him in conversation with a friend, who suggested that it would be proper to give *formal notice* to Mr. Rodber, the officiating curate, that Mr. Saunders was in attendance, as a matter of curtesy; and that the said Henry Hatchard, as a supporter of the said Mr. Saunders, was a proper person to communicate such notice to Mr. Rodber—*that* the said Henry Hatchard thereupon proceeded towards the *vestry*, for the purpose so suggested; but that, encountering Mr. Rodber in his way from the said vestry, which he had just left, to the pulpit steps, he said to him, in a very low tone of voice, and in a mild and respectful manner, "Mr. Rodber, Sir, the Rev. Isaac Saunders is here to perform the duty to which he has been elected"—*that* the said Rev. William Johnson Rodber taking no notice thereof, the said Henry Hatchard immediately turned away, and left the said church, which he did not re-enter during



that afternoon—*that*, on the said Henry Hatchard so turning away, several persons cried out “Shame, Shame,” and “For shame, Mr. Rodber,” or to that effect; and there was a noise, and a hissing, and a considerable tumult, in the said church; but *that* the said Henry Hatchard took no part in the same—that he had not *previously* shouted or said, in a loud tone of voice, or otherwise, “We want some friends at the vestry-room door;” and that he did not, *subsequently*, accompany the said William Johnson Rodber towards the pulpit steps, exclaiming, “For shame, Mr. Rodber,” or to that effect; or address him in any other words than those before pleaded.

No evidence was adduced in support of this allegation; but three witnesses were produced and examined upon the articles.

Frederick Price, one of the *bearers* of the parish, deposed (in substance)—that he was at the parish church of St. Margaret, Westminster, on the afternoon in question, and that, just after the evening prayers were finished, he observed Mr. Hatchard (whom he had never seen at the said church before, but at a funeral, he being an undertaker) standing very near the vestry door, *by* the deponent, whose office it was to attend the officiating clergyman from the vestry to the pulpit—that he distinctly heard him say to a person who stood close to him, “we want a few friends near the vestry-room door”—*that*, as Mr. Rodber was passing from the vestry towards the pulpit, he was closely followed by Mr. Hatchard, who said to him, in the deponent’s hearing, plainly and distinctly, “Shame, Mr. Rodber, Mr. Saunders is regularly elected—why not let him preach?—for shame of you”—*that* immediately

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upon Mr. Rodber's ascending the pulpit, a number of persons began to hiss and shout, and call out "shame"—whereby so great a tumult was excited, that a very few of the congregation could possibly distinguish Mr. Rodber's sermon, although preached in his loudest tone,—and *that* after the service was over, the crowd, which was greater than ever the deponent had seen there, either before or since, would not quit the church till a magistrate was sent for, and arrived, from the Queen Square Police Office, accompanied by several constables—and that it was between five and six o'clock before the church was cleared. This witness further deposed, that "although there was some talking, and a kind of murmuring noise, *before* Mr. Hatchard addressed Mr. Rodber, as above—yet there was nothing violent or outrageous until *after* he had so addressed him."

The Rev. William Johnson Rodber (in substance) deposed, that on Sunday, the 10th of December, 1820, he attended the afternoon prayers at the parish church of St. Margaret, Westminster, as assistant curate of the parish—that as soon as the clergyman who read the prayers, had finished, he left his pew, and retired to the vestry—that, on leaving the vestry for the pulpit, where the deponent was about to preach, his progress was impeded by a great number of people about the vestry-door, among whom was Henry Hatchard, the party proceeded against, so that the deponent had great difficulty in effecting a passage towards the pulpit—that he had proceeded but a short way from the vestry, when he felt the left sleeve of his gown pulled, and heard his own name called out; where-

upon he turned round, and saw the said Henry Hatchard, who immediately said, " Mr. Rodber, here is Mr. Saunders, ready to do his duty, will you choose to let him preach?" [The deponent says, that he had observed the said Rev. Mr. Saunders in the said church during the afternoon prayers, and knew him to have been elected afternoon preacher, by the parishioners, although he had been denied the use of the pulpit, even for a probationary sermon, and had been told that it would still be denied to him, in the event of his being elected]—*that* the deponent did not make any reply to the said Henry Hatchard, but passed on—*that* the said Henry Hatchard kept close to the deponent, and, as he was passing near the rail of the altar, again addressed him, saying, angrily, " Mr. Rodber, why won't you let Mr. Saunders preach—he has been regularly elected?—for shame"—*that* deponent still not answering, but forcing his way through the crowd, a most violent outcry and noise immediately took place—*that* in his passage through the crowd, to the pulpit steps, which the deponent, with difficulty, effected, by aid of two of the church beadles, he was kicked till both his legs were black and blue, and hissed at, and spit upon—whilst there were many persons crying out " Mr. Rodber, come back, don't disgrace yourself"—*that* the deponent delivered his sermon in the midst of an uproar, which continued during the whole service, and was loud enough, at times, to drown the sound of the organ, and the voices of the congregation and the charity children—*that* this uproar was such as the deponent had never, upon any occasion, before witnessed, and *that* after the service, the crowd

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was obliged to be dispersed by constables—that it was evidently the intention of the persons who hustled the deponent in his way to the pulpit, to prevent him from reaching it—and *that* the said Henry Hatchard was principally instrumental in this attempt, and in exciting the tumult and disorder which otherwise existed in the said church.

The evidence of John Woodward, also one of the bearers of the parish, was precisely corroborative of that of Price, the first witness, and that of Mr. Rodber.

#### JUDGMENT.

Dr. SWABBY. [after stating the charge, and recapitulating the evidence.]

Upon this view of the case I conceive it impossible to deny that the offence imputed to this defendant, and which, as appears, may be one of grave consequence, is brought home to him by the clearest and most indisputable evidence. In particular, no language can be a “chiding and brawling” within the statute of Edw. 6, in a *truer* sense of the words, than the defendant’s expostulations, or remonstrances, with Mr. Rodber, as spoken to by the several witnesses, upon the occasion in question. The attempted justification set up (*in plea*) can be regarded in no other light than that of a mere pretext. Not only was a “formal notice” to Mr. Rodber that Mr. Saunders was in attendance purely superfluous, but its delivery can scarcely, I think, under the circumstances, be ascribed, by any stretch of charity, to a laudable motive. But be that as it may, it is certain, that the scene of tumult and disorder which ensued was the actual, if it was not the designed, consequence of the delivery of this

"notice" by the defendant; who therefore has been selected, in my judgment, with great propriety, as the person against whom these proceedings have been instituted. A very little inquiry, which it was his duty to have made, if inclined to meddle in this matter all, would have instructed him, that in the case of every, at least *unendowed*, lectureship, no choice, by the parish, of a lecturer is effective, without the consent or approval of the rector(a); whose undoubted right it is, in every such case, to grant to, or withhold from, the lecturer so chosen the use of his pulpit. At all events, however, he could not be ignorant that if Mr. Saunders had a legal right to the pulpit in the instance in question, there must be a legal mode of enforcing it—that any other mode of attempting to enforce it *was* as unjustifiable, as it must *eventually prove* unavailing; and that an appeal to private judgment, or rather to popular feeling upon such a subject (which this defendant's conduct amounted to, in my apprehen-

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(a) No person can be a lecturer, endowed or unendowed, without the rector's consent, unless there be an immemorial custom to elect without his consent—where there is such a custom, it is binding on the rector, as it supposes a consideration to him. The *endowment* only seems material, in this respect, as it does (or may) furnish an argument in support of the custom, and to shew that it had a legal commencement. See 2 Str. 1192. 1 Wils. 11. *Rex v. Bishop of London*, 1 T. R. 331; and *Rex v. Field and others*, 4 T. R. 125.

Even after the rector's consent is obtained, the bishop's license is also necessary—if not as forming part of the title of the lecturer, still, at least, to exempt him from the penalties of 13 & 14 Car. 2.\* c. 4. Vide 1 T. R. 331.

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\* Vide s. 19. and Canons of 1603. Canon xxxvi.

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sion of it), was illegal, as well as, in the highest degree, indecorous.

It remains only to pronounce the sentence of the law, which assigns to this species of offence, the offender being a layman, the penalty of suspension *ab ingressu ecclesie*, for a discretionary period. I am induced to limit that period to one month only (to be computed from Wednesday next) in the present instance, from the circumstance of this defendant being an undertaker. I trust that he will be sensible of the lenity of the Court in this respect—and that, in future, he will be led to his parish church by better motives, and conduct himself in it with greater caution and propriety.

I accompany this sentence of suspension with a decree for *costs* against Mr. Hatchard, as a matter of course.

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## ARCHES COURT OF CANTERBURY.

SCHULTES *v.* HODGSON.

(*An Appeal from the Consistory Court of Sarum.*)

**THIS** was an appeal from the Episcopal Consistorial Court of Sarum, promoted and brought by the Rev. John Schultes, vicar of the vicarage and parish church of Hagbourn, in the county of Berks, diocese of Sarum, and province of Canterbury, against Christopher Hodgson, of Parliament Street, Westminster, in the county of Middlesex, and province aforesaid, from two certain orders or decrees, made, and interposed, in a certain cause, or business, of the office of the Judge, promoted by the said Christopher Hodgson, against the said Rev. John Schultes, "touching and concerning his soul's health, and the reformation of his manners, and correction of his excesses, and more especially, touching and concerning the crimes of fornication, adultery, and incontinency, committed by him, *and the fame thereof.*" By the first of such orders or decrees, bearing date the 22d of November, 1821, the Judge appealed from "admitted the articles tendered by the promovent" *only upon that same Court day*, notwithstanding the defendant dissented to their admission, and prayed to be assigned a term, to the next Court,

1. The admissibility of articles is not debateable, in an appeal Court, upon an appeal entered more than fifteen days after their admission by the Court *à quo*.

2. In criminal suits, the defendant's answers, upon oath, are not to be required, even to those heads or positions, which are not, in themselves, criminatory.

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in order to consult upon their admissibility ; by the second, bearing date the 19th of December, he, the said Judge, further decreed, that " the defendant should take the *usual oath* for his personal answers to the said articles." The other proceedings had in the Court below are stated in the judgment.

On the part of the appellant, various objections were taken, by counsel, to the articles admitted as above, in point both of form and of substance—in particular, it was submitted, that the time had gone by, when Ecclesiastical Courts would, or ought to, proceed upon *common fame*. They also contended, that it was not competent to the Court appealed from to require the defendant's answers, on oath, to articles exhibited against him, under the stat. 13 Car. 2. c. 12. s. 4 (a)—and that *this* was a grievance which the Court, must, at once, pronounce for, whatever became of the *other* alleged matter of grievance, the admission of the articles.

On the other hand it was contended, by counsel for the respondent, 1st, that no exceptions could *now* be taken to the articles—their admission having been acquiesced in for a longer term, than that prescribed, by law, for an appeal ; and 2dly, on the authority of Oughton (b), that the defendant,

(a) Which enacts, that " it shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person whatever, the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself, of any criminal matter or thing, whereby he or she may be liable to censure or punishment."

(b) Vide Oughton, Tit. 66. 141, 142.



being himself present in Court, was bound to take the oath, and to answer to such positions or articles as were not criminatory (as to the first, for instance, pleading that the defendant was a clerk in holy orders, and vicar of Hagborn; to the 11th, pleading the jurisdiction of the Bishop of his diocese, &c.) though not to answer to such parts of the articles as conveyed any *criminal* imputation. They admitted, indeed, that the practice was otherwise, in the superior Ecclesiastical Courts—but they protested against the Judges of the Diocesan, and inferior Courts, which were *slower* in their changes, being liable to be appealed against for grievances, in adhering to the more ancient, and, as they insisted, the correcter (or, at least, in many respects, the more convenient) practice.

## JUDGMENT.

SIR JOHN NICHOLL.

This is an appeal from two orders or decrees made by the Consistory Court of Sarum, in a cause of office, originally promoted there against a clerk of that diocese, for adultery, fornication, or incontinency.

The proceedings had in the Court appealed from, seem to have occupied, in all, but *three* Court days. On the first of these, the 31st of October, *being the day of the return of the citation*, the party cited, not appearing, was pronounced contumacious. No writ (*a*), however, appears to have issued: and on the 2d Court day, the 22d of November, the defendant having appeared voluntarily, and taken the usual oath, &c. was absolved from his contumacy. The articles were then brought in,

(a) Viz. "*De contumace capiendo*." Vide 53 Geo. 3. c. 127.

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and were admitted, *instantly*, notwithstanding the dissent of the defendant's proctor; and the defendant was monished to answer *immediately*: whereupon, the articles being first read over, the defendant gave, in person, a negative issue, and the proctor for the promovent was assigned a term probatory, till the next Court. On the 3d, and next following, Court day, the 19th of December, the Judge, at the petition of the proctor for the promovent, decreed, that the defendant should "take the usual oath for his personal answers"—when his proctor, for the first time, protested of a grievance, with intent to appeal. That appeal was entered accordingly, and has since been prosecuted, and the Court has now to determine on the matter, or matters, of alleged grievance.

The grievances (for they are to be spoken of in the plural number) purported to be appealed from, *in special*, seem to be, 1st, the admission to proof, *instantly*, of the articles, notwithstanding the dissent of the proctor for the defendant, on the 22d of November; and 2dly, the order or decree of Court, for the defendant's personal answers upon oath, of the 19th December.

Now, as with respect to the first alleged grievance—that of the 22d of November—it is observable, that this appeal is only entered on the 24th of December, clearly after the fifteen days allowed by the statute (a). No appeal is protested of, even, till the 19th of December—and the protest is then only of appeal from steps taken by the Court on

(a) 24 Hen. 8. c. 12. s. 7. Ten days for appeal are assigned by the Canon Law, and the same rule was adopted into the *reformatio legum*.

*that* day, and not of appeal from the admission of the articles on the Court day preceding. The defendant, too, had acquiesced (*a*) in the admission of the articles, by complying with the assignation of the Court in giving a negative issue, of course *subsequent* to their admission.

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Upon these grounds I am of opinion that, however harsh and precipitate the proceedings in the Court below may have been, and however at variance, not merely with formal, but, in some respects, with substantial justice (for instance, as well in pronouncing the party contumacious *on the very day of the return of the citation*, which is still *not* complained of as a grievance; as in admitting the articles without affording the defendant time, or opportunity, to consult upon their admissibility, which *now* is, still), I am of opinion, that the admission of the articles had been too long, and too far, acquiesced in, to be duly appealed from; and, consequently, that the articles must stand admitted in their present form, however objectionable that form may be; the question of their admissibility being one of which the Court has no authority to dispose. Whether, if substantial justice require it, the Court, in the progress of the suit, may not devise some means of putting these articles into a more regular shape, if irregular in their subsisting form, is a point as to which it would be useless to enter into any *present* speculation. Mean time I may suggest to the counsel for the promovent, the propriety of considering

(*a*) *Non potest appellare qui terminum recipit ad procedendum, vel ad solvendum, vel alias, processui causæ acquievit.* Alciat. Præ. 253.

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whether, and how far, it would be advisable to proceed to examine upon articles which were substantially faulty in their original frame, and construction; without at all committing myself to any opinion that the articles in question are such.

The other matter of grievance, the order or decree for the personal answers of the defendant, is *duly* appealed from: so that the only question in respect of this is, was it, or was it not, in its own nature, an appealable grievance? Nor is it a question which imposes on the Court any sort of difficulty. This is a criminal suit; and I am clear that, in a criminal suit, under the statute of Car. 2. the answers on oath of the defendant are not to be required (*a*). An issue negative, or affirmative, is the only answer, and the calling for any other certainly is an appealable grievance.

The Court was aware indeed, prior to the argument, that the contrary was asserted by Oughton, whose authority upon points of this nature, *generally*, is not lightly to be questioned. But the *practice* (if such were the *practice*) of Oughton's time, has been varied in all modern instances, and I conceive correctly, according to the very wording of the statute. For the statute provides, that no ecclesiastical Judge shall *tender* any person whatsoever, *any* oath, whereby such person shall be *charged* to purge him or herself of any criminal matter or thing: it not simply justifies the party to whom the oath in question is tendered, in refusing to take it;

(*a*) It should seem, that if the Ecclesiastical Court proceeded to enforce answers in a criminal suit, prohibition would lie. See *Goulson v. Wainwright*, 1 Sid. 374.

but it prohibits the very tender of it, by any person exercising ecclesiastical jurisdiction.

It is argued, however, that this statute only goes to protect parties from being forced to answer *criminal charges*; and that it contains nothing which prevents the *usual* oath for answers from being administered to defendants in criminal suits, so as to oblige them to answer those articles objected to them, which are not criminal charges. To this interpretation of the statute I can by no means assent; it being neither consonant to practice, nor to those general principles, which govern, in this country, the administration of criminal justice.

And first, as to practice, the contrary has been laid down by this Court in such repeated instances, that it would be mere idle pedantry to refer to particular cases. It may, indeed, be the *modified* practice in civil suits, founded on criminal imputations; it is clearly not the practice at all, in suits directly criminal. For instance, if adultery be proceeded against by libel, *quoad petendum divortium*; the defendant's answers *may be* (though seldom *are* (a)) taken to such parts of the libel as involve no, direct or implied, charge of adultery. But if adultery be prosecuted by articles, *quoad pœnam legalem*; the defendant's answers *may not* be taken, not even (that is) to such parts of the articles as involve no charge of adultery, either direct or implied. The same

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(a) An issue, if confessing the marriage, though otherwise contesting suit negatively, is all that is required. Answers are seldom, if ever, called for in cases of this description; unless as to the fact of marriage, where the defendant's proctor has given a negative issue to the libel, *generally*, a step which is rarely taken.

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holds, *mutatis mutandis*, in proceedings for incest, and in other cases. It is the not attending to this settled distinction, which may have given rise to the erroneous notion that answers may be called for in criminal suits.

Nor, secondly, do I conceive that calling for answers in suits of this description, is more at variance with the correct practice, than it is objectionable upon sound principle. On principle, parties are neither compellable to render themselves, nor to furnish their accusers means of rendering them, obnoxious to censure or punishment: they are neither to be forced to implicate, nor to do any thing which has a tendency to implicate, themselves. The guilt of parties under prosecution is to be sifted out by the depositions of witnesses and other "due proofs and evictions," from the number of which the parties own answers are excluded, as well by natural justice as, I conceive, under the statute of Car. 2. by positive law. In criminal suits the maxim is, "*actor non probante, reus absolvitur*." And it is obvious how much of the burthen of proof may be shifted from the "*actor*"—the promovent—by the defendant's answers, even to such heads or positions objected to him as are not in themselves, and directly criminatory. Admissions from the defendant of those parts of the articles which are *not* of this kind, may be the means, (perhaps the only means) of helping the promovent to the proof of those parts of them which *are*. Add to this, that the *popular*, at least, though not the *just* and *legal*, inference, deducible from the defendant's answering articles in part, and declining to answer the criminal charges, is an admission of his guilt. And it is contrary to

natural justice, that a defendant, even if guilty, should be put to the alternative of perjury, or any thing in the nature of *confession*; the more especially as the same defendant, swearing himself *innocent* (as the fact might be) of the offence imputed to him, could hope to obtain but little credence, and expect to derive but little benefit.

As to the single other point insisted upon in the argument, the hardship of sustaining appeals from inferior Courts for pursuing the ancient, in preference to the modern, and, it is to be presumed, the correcter, practice; the general answer to arguments from topics of this nature is simple and obvious. Where those Courts have deviated into mere formal irregularities, the visiting of these with any thing of strictness by this Court, may justly be deprecated as harsh. But where their course of procedure violates either the rules of positive law or the dictates of natural justice, or both these together, this Court is bound to administer a correction to them which it can *only* apply, by sustaining appeals from those orders, or decrees, to which that course of procedure may have led.

Upon these considerations I reverse the order for the defendant's personal answers, and retain the cause. The observations which I have made, hypothetically, upon the articles, are in the recollection of the respondent's counsel, and will, I have no doubt, be attended with due effect.

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DURANT v. DURANT.

*{An Appeal from the Consistorial Episcopal Court
of Litchfield and Coventry.*

THIS, in the first instance, was a cause of divorce, or separation *à mensâ et thoro*, by reason of adultery, promoted and brought by Mary Ann Durant, wife of George Durant, Esq. of the parish of Tong Castle, county of Salop, in the diocese of Lichfield and Coventry, and province of Canterbury, against the said George Durant, Esq. in the Consistorial Episcopal Court of Lichfield and Coventry. The present appeal was entered, on the part of the original defendant, from a sentence or order of that Consistory Court, pronouncing him *in contempt*, and decreeing him to be *signified*, pursuant to the statute (a).

Whatever is to be done, personally, by the party principal in the cause, requires, in strictness, a personal service of the notice, or decree, for doing it, upon the party principal. Hence, the service of a decree for answers upon the proctor, will not justify the Court in putting the principal in contempt, if those answers are not brought in.

The proceedings had in the Court below are stated in the judgment.

JUDGMENT.

Sir JOHN NICHOLL.

The course which the present appeal has taken relieves me from the obligation of determining on the merits of it; for it appears, if I may so say, to have determined itself. But it involves a question of some nicety in practice; upon which it may be convenient that I should embrace the opportunity, thus afforded me, of delivering my opinion.

(a) Stat. 53 Geo. 3. c. 127.

This in an appeal from the Consistory Court of Coventry and Lichfield, where the suit originally depended, being a suit of separation *à mensâ et thoro*, promoted by the wife against the husband for adultery. The citation was returned, personally served on the 18th of January, 1820; but no appearance was given for the party cited, till the 8th of May, 1821; and then only, it should seem, in consequence of a notice served upon the party on the 17th of April preceding, that he would be put in contempt and signified, failing to appear upon that day. A libel and allegation of faculties were brought in on the 22d of May, and were admitted on the 3d of July, when a *general* negative issue to the libel was given for the defendant, and a decree for answers, both to the libel and allegation of faculties was prayed for the plaintiff. The decree was subsequently extracted, and was returned on the 9th of October, *personally served upon the defendant's proctor*, who appeared to the decree, and was assigned to bring in his client's answers by the next Court. This assignation was continued from Court day to Court day, till the 15th of January, 1822, when the Judge (having already previously directed a notice to be served on the party, and which was actually so served on the 8th of November, that he would be put in contempt if his answers were not filed as on the 20th of November preceding, his proctor *then* appearing, and still appearing from Court day to Court day, and praying further time). pronounced the defendant in contempt, from which supposed grievance this appeal has been duly prosecuted to its present stage.

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Now, on the face of these proceedings, there are strong grounds to suspect, that the defendant has been, vexatiously, endeavouring to obstruct the course of justice to the plaintiff. No appearance even was given till more than a year and a quarter after the return of the citation; and though something has been said of compromise, and of proposed arrangement, which *partly* relieves from the impression produced by that fact, still, it is to be remembered that, this appearance, at last, is only obtained by threats from the Court of resorting to its compulsory process. A general negative issue is then given to the libel (quite out of the usual course), not even confessing the *marriage*; so that the Court, with no *constat* before it of a fact of *marriage*, could allot the wife nothing on the account, or in the nature, of alimony. Lastly, an interval of nearly six months occurs between the decree for answers, and the step appealed from—the answers to the libel, though said to be ready, being then unfiled, and the answers to the allegation of faculties not even being asserted to be in a state of forwardness (a).

It is not to be denied that the proceedings here stated compose a case of great, I may even say of extreme, hardship upon the wife. Still, however, the Court would have been put to some difficulty to pronounce *against* the present appeal, in the absence of "*a personal service, upon the party, of the decree for answers;*" in which absence I should

(a) The appellant's proctor merely prayed "*further time,*" upon a statement that his client's "answers to the libel, settled by counsel, had been just left with him," but that his answers to the allegation of faculties "*had not yet come to his hands.*"

hardly have been led to decide, that the present appellant was duly and lawfully put in contempt. And this is a question which the Court might have had to determine judicially, with reference to the merits of the present appeal, had it been made a point of, and insisted upon, by the counsel for the appellant, and had not the appeal been pronounced for, less upon the merits than, under a sort of arrangement between the parties (*a*). As with any

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(*a*) The following is the minute of the judgment entered by consent. "Bedford (proctor for the appellant) prayed the Judge to pronounce for the appeal, and complaint made and interposed in this behalf, and for his jurisdiction, and that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly—to reverse the order or decree appealed from—to retain the principal cause—and therein to allow time for him the said Bedford to give in his client's answers. Box (proctor for the respondent) prayed the Judge to pronounce against the appeal, and complaint made, and interposed in this behalf, and that the Judge, from whom the same is appealed, hath proceeded rightly, justly, and lawfully—to affirm the order or decree appealed from, and to retain the principal cause—and therein to decree the said Bedford's party in contempt, and his contempt to be signified according to the act of parliament, in that case made and provided, for not having obeyed the order or decree of the Judge from whom this cause is appealed, and to condemn the appellant in costs. The Judge having heard the proofs read, and advocates and proctors on both sides thereon, by interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced for the appeal and complaint made and interposed in the said cause, and for his jurisdiction, and that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly, reversed the order or decree appealed from—retained the principal cause—and therein assigned Bedford to give in his client's answers the next Court day."

A new decree for answers was also further directed to issue, at petition of Box.

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immediate reference therefore to the present appeal, the question, in a manner, merges, still however it may be convenient, I repeat, as a guide to practitioners, in these and similar cases, that I should state, and examine, somewhat indeed extra judicially, and without the point having been argued; what the correct practice, in this matter of personal answers, is.

And here, in the first place, it may save time to inquire what was the *old* practice in the matter inquired of; for if *that* be consonant to reason and analogy, and has undergone no *authoritative* alteration, it is, or ought to be, the practice of the Court at the present day.

From the old practice then as laid down by Oughton, Clerk, and Consett, it is to be collected that personal answers *were* twofold—being to be had, in certain causes, on special application, from the proctor in the cause, as well as from the principal. This is distinctly laid down by Oughton; for instance, in the 16th sec. of his 61st title (a), “*de litis contestatione*,” and in the subsequent section

(a) *Nota etiam, quod procurator actoris, postquam lis sit contestata, si crediderit se in aliquo [videlicet in aliquâ positione materiali libelli, præsertim positione aliquâ libelli matrimonialis] posse relevari ex responsis procuratoris partis adversæ, potest primò [scilicet ante decretum pro parte principali] jurare, pro parte suâ, quod credat se fideliter posuisse* contenta in libello, et petere juramentum a procuratore partis adversæ præstari, de fideliter respondendo positionibus ejusdem libelli in proximo die juridico: quod est concedendum.* Oughton, tit. l. xi. s. 16.

* This, in Oughton, is misprinted *potuisse*.

[s. 17 of the same title (a)], the suits, in special, where the proctor's answers may be had, are pointed out, and the uses to which they are capable of being made subservient in these suits, are ascertained. Now this being so, I apprehend that notices or decrees for personal answers were always served accordingly; that is, notices for such answers from the proctor, upon the proctor; and decrees for such answers from the party, upon the party.

It is true indeed that Oughton, in his 62d title, refers to a note on title xxi. [Obs. 9.] by which it seems, that a decree for the answers of the party principal in the cause *may be* served on his proctor. But this can only be, he observes (b), under the special authority of the Court, in virtue of a special clause inserted in the decree itself; and consequently it forms no exception to the rule, that in

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(a) *Et est admodum necessarium ut hoc fiat, in causa restitutionis obsequiorum conjugum, vel divortii aut separationis à thoro et mensa: nam de verisimili procurator rei est ita instructus à domino suo, quod vult fateri solemnizationem matrimonii allegati; ex quo, procurator mulieris agentis potest adstatim petere sumptus litis et alimonie, dominæ suæ decerni, quod alias petere non possit, nisi postquam ipsa pars criminalis fuerit examinata; quod plerumque (præsertim in his casibus) differtur, per rei contumaciam, ad evitandum condemnationem in eisdem expensis litis et alimonie.* Oughton, ubi sup. s. 17.

(b) *Citatio verò, seu decretum citatorium pro responsis (post litis contestationem) personalibus partis principalis exequi solet vel in partem ipsam principalem, per ostensionem ejusdem sub sigillo judicis officii, et relictionem notulæ (ad effectum ejusdem) anglicanæ; vel, ut supra, viis et modis; aut aliter, vi clausulæ cujusdam in ipso decreto (cum ita petatur a judice) specialiter inserendæ solummodo, nonnunquam exequi solet in procuratorem originalem in causâ, pro dictâ parte exercentem; ostendendo scilicet decretum hujusmodi pro responsis, sub sigillo; et veram penes eum relinquendo copiam ejus.* Oughton, tit. xxi. obs. 9.

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ordinary cases, the decree for the personal answers of the party principal must be personally served upon the party principal. Oughton's whole 62d title represents, under ordinary circumstances, the decree for the personal answers of the party principal, as a formal process, under seal of the Court, against the party principal, and required to be served, personally, upon the party, as contradistinguished from any mere assignation or notice to be served upon the proctor. And this, I conceive, to have been, invariably, the old practice, except as excepted in the 9th obs. on Oughton's 21st title—an exception not at all applicable to the case of present appeal, or in ordinary instances.

So stood the old practice, a practice, I must also remark, both perfectly reasonable in itself, and perfectly consonant with the practice of the Court in analogous cases. For the reasonableness of the practice, it is too obvious to be insisted upon; and for its consonance with analogy, we all know, that whatever is to be done, personally, by the party, absolutely requires, in strictness, a personal service of the notice or decree for doing it upon the party. Where steps are to be taken by the proctor merely, a mere assignation upon the proctor suffices—he, *quoad hæc*, being “*dominus litis*.” But where the personal intervention of the principal is requisite to the act to be done, as it is, for instance, where costs are taxed against him, or where sums are decreed to be paid by him on account of alimony, the practice is to take out a monition against the party, not merely to serve a notice on the proctor, which monition must be personally served upon the party; in all cases, that is, where it is requisite that the

proceedings should be conducted with any semblance of regularity.

It must be conceded, however, in this matter of *personal answers*, that the modern practice has been to serve the decree on the proctor only, and not on the principal. This may have arisen, partly perhaps from the two species of personal answers already alluded to (the latter, for obvious reasons, now obsolete) being confounded in modern practice; and, partly, because persons seldom hang back in this matter of *answers*, which are to be obtained, in most cases, without any sort of difficulty. *Being the practice*, however, I should be disposed to admit, that a service of the decree for answers, though merely upon the proctor, might be a sufficient service of the decree for very many purposes. For instance, if, after such service, the party's answer to an allegation of faculties were not brought in within a fit and reasonable time, it might justify the Court in allotting sums on account of alimony (the marriage, that is, being proved or confessed) in proportion to the full extent of the faculties alleged; and so on. But it is a very different question whether such a service would justify the Court in putting the party in contempt, and proceeding to signify him, in order to his imprisonment, under the statute; a measure which, I conceive, Ecclesiastical Courts to be only warranted in adopting, where the prior proceedings have been conducted with the strictest regularity.

Nor would it vary the case, in this view of it, to my apprehension, that *notice* of the decree should have been served on the principal, or that the proctor should have *appeared* to the decree, and prayed

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further time, and so forth; both which circumstances occurred in this very suit. As for the notice, that was a mere notice from the adverse proctor; the only notice which the party was bound (under *this* penalty at least) to obey, being the decree of the Court, under seal of the Court, *duly*, i. e. personally, served upon him, the party. As for the proctor's appearing to, and acting upon the decree, I can by no means think the act of the proctor so binding on the principal—unless, indeed, in virtue of some special clause to the effect of enabling him to accept services of decrees, &c. upon the principal, inserted in the proxy—for I cannot concede that a party may be put in contempt, and signified so as to become liable to all the penalties of contumacy, merely from his proctor doing that, for doing which he has no strict legal authority.

Such then being the old practice, and being so, as it is, consonant both to reason and analogy, it remains only to inquire whether it has undergone any authoritative alteration in later times. Nor do I conceive that the inquiry can be attended with any sort of difficulty. Is there any adjudged case producible where this Court has proceeded to enforce decrees of this nature by its compulsory process, in the absence of a personal service? I am confident there are none. Can it even be shewn that such decrees have been so enforced, unless after a personal service, the whole matter passing *sub silentio*? I am nearly as confident that *this* has not occurred; for the Court *is* always (or means to be) satisfied that there has been a personal service before issuing its compulsory process in this description of cases. The result therefore of the whole inquiry, which is



almost too obvious to be stated in terms, is, that the old practice in this matter of personal answers, being both perfectly reasonable, and perfectly analogous to the correct practice in similar cases, should and *must*, in all cases, *stricti juris*, be the practice of Ecclesiastical Courts at this very day.

For the present appeal I have only to pronounce for it, upon the understanding, and under the terms, arranged between the parties; and I direct that the Judge of the Court below shall be apprized, at once, of this decree, and of the grounds upon which it has proceeded.

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3d Session.

IN THE PECULIARS COURT OF CANTERBURY.

## CLIFFORD v. MABEY.

*Quere*, whether a party can be entitled to sue or defend as a pauper in a defamation cause?

A party's swearing himself not worth 5*l.* gives him no indefeasible right to be admitted a pauper—that fact, if denied, must be specifically proved. Nor will even proof of that fact be sufficient, if the party can be fixed with the receipt of a competent income.

**THE** present question arose upon the right of a party to be admitted a pauper in a suit for defamation.

## JUDGMENT.

SIR JOHN NICHOLL.

This is a cause of defamation promoted by Martha Mizzlebrook Clifford, against Henry Mabey. The citation was returned on the 1st Session of Michaelmas Term, 1821, when the party cited appeared, personally, and prayed a libel, which was brought in, and admitted. A negative issue being given to the libel, witnesses were examined, and publication was prayed—when the defendant, still appearing personally, asserted an allegation.

On the 1st Session of Hilary Term, 1822, the defendant, still only giving a personal appearance, prayed to be admitted a pauper. This was objected to, on the part of the plaintiff, who has stated his grounds of objection in an act of Court, to which the defendant has also written, in support of his prayer. Affidavits are brought in, on both sides; and the question for the Court to determine is, whether the petitioner is, or is not, entitled, to be admitted to defend this suit, in *forma pauperis*. It is denied that he is so entitled, on the part of the original plaintiff, as well, 1st, from the nature of the suit, as, 2dly, from the state of the petitioner's circumstances. In determining this question, I

shall endeavour to keep these two heads of objection distinct and separate; only premising, that as the privilege claimed, that of appearing *in formâ pauperis*, is a great privilege in law, on several accounts, the claim must be clearly made out, before the privilege itself can be conceded.

1. First, then, I entertain considerable doubts, whether a party can be admitted, either to sue or defend, as a pauper, especially the latter, in a cause of defamation. A defamation cause is in the nature, at least, of a criminal suit—it is styled by Oughton, *causa mixta* [*hoc est—partim criminalis, partim civilis*]*—*and again, with greater precision, *causa criminalis, civiliter intentata**—*and I strongly question, whether in reason, and upon principle, it is competent to a party, under any circumstances, to appear as a pauper in a suit of this description (a). Of any precedent for the present application, I am wholly unaware—nor would the Court be induced, by acceding to the prayer of this petitioner, to furnish a precedent, which might be nearly tantamount to licensing persons of a low condition to defame their neighbours with impunity, unless it felt itself deprived of any discretion on this head, by some

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(a) The statute 11 Hen. 7. c. 12, clearly relates only to civil suits. It should seem, however, a defendant in some kinds of misdemeanor, may be admitted to defend in *formâ pauperis*—but the reason *there* is said to be, that the prosecutor, *who can have no costs*, is not prejudiced—a reason observed by the Court, not to apply in this case. Vide *Rex v. Wright*, 2 Stra. 1041. The provision in 2 Geo. 2. c. 28, only applies to defendants in actions brought relating to the Customs.

It was held in *Rex v. Pierson*, 2 Burr. 1039, that a defendant could not be admitted pauper *upon an attachment for a contempt*. But the decision *there*, proceeded upon a quite distinct principle.

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paramount authority. On the contrary, however, the single authority in point, with which I am acquainted, or to which I have been referred, is express, that parties are *not* admissible to sue or defend as paupers in defamation suits (a). It occurs in Oughton's 8th tit. "*de admissione in formâ pauperis*," or rather, in a note on that title; but it is to be observed, that Oughton's notes, generally speaking, are of at least equal authority with his text—the notes being explanatory of the practice in Oughton's time; the text of the older, and commonly less correct, practice in the time of Clerk.

2. But, secondly, I am of opinion, that the facts disclosed in this act of Court, and upon the affidavits, would not justify the Court in conceding to the petitioner this great legal privilege—if the law were otherwise, or if the petitioner were defendant in a mere civil suit. From the petitioner's own affidavit it results, that at the time when the defamatory words are charged to have been uttered, and at the commencement, and long subsequent to the commencement, of this suit, he was a master shoemaker, employing two journeymen, and occupying a house at Walworth, at the annual rent of 18*l.* including the taxes, indeed. It appears, too, that he only finally withdrew from this house on the 21st of January, in the present year—the *very day upon which he prayed to be admitted a pauper*—a circumstance which justifies a *suspicion*, that he *only* withdrew from it for the express purpose of that prayer. The petitioner has deposed, indeed, to the diminished state of his business and income,

(a) *In causa diffamationis non est omnino admittenda pars in formâ pauperis.* Oughton, tit. 8. n. (b.)

for the last twelvemonth, which he ascribes to circumstances into which it is not necessary for me to enter—yet I observe, that even during this period, he admits the average amount of his weekly income at 20s. Add to this, that he has still a shop in which he carries on his business, and “furniture, goods, and effects,”—which, though he swears them not to be worth 5*l*. he has not specified, as he ought to have done; so that neither the adverse party, nor the Court, has any means of forming an estimate of their probable value. So, again, the petitioner has sworn himself unable to pay up the arrears of rent due for his late dwelling-house, as also, to discharge his debts—but neither the amount of these arrears, nor that of his debts, nor how these last were incurred, is stated in any manner. As for the petitioner swearing himself not to be worth 5*l*. after payment of all just demands upon him—this gives him no indefeasible right to be admitted a pauper, where that step is objected to—the fact of his not being worth 5*l*. if denied by the other litigant, must be specifically proved. Nor will even proof of that fact be sufficient, if the petitioner, notwithstanding such actual insolvency *upon the balance*, can be fixed with the enjoyment of a competent *income*. Were this otherwise, many persons, of large expenditure, and living in splendour and luxury, might entitle themselves to the gratuitous labors of others, as well as place their legal adversaries under very undue disadvantages, without any risk of a prosecution for perjury. This was explicitly stated by the Court in the case of *Lovekin v. Edwards (a)*, a case

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in which this question was much canvassed, and fully entered into—from the general principles laid down in which case, I see no reason whatever to swerve or depart.

Upon these considerations, I am satisfied that I cannot, in justice to the other party, admit *this* defendant (if a defendant in any *such* suit) a pauper; and I pronounce accordingly.

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PREROGATIVE COURT OF CANTERBURY.

1st Session.

**ROOSE v. MOULSDALE.***(On the Admission of an Allegation.)*

**STEPHEN ROOSE**, late of Bryntirion Amlwch, in the Island of Anglesea, died on the 6th of October, 1821, a widower, leaving behind him three sons and four daughters.

Within a few days after the deceased's death, the following testamentary paper, all of his own hand-writing, was found between the leaves of a ledger-book, locked up in the deceased's bureau.

A testamentary paper, which is neither a *finished will* in itself, nor proved to have been such in the deceased's apprehension of it, is of no effect; where the deceased had full time and opportunity, if he had thought proper, to have rendered it a *finished will*.

"(a) Of what I purpose to be my Will:—That my Son Stephen Rose his to be my sole Executor of all my Estat's Lease Hold Property of all discriptions of Cash Mortgages Bonds Notes of Hand Promisory Notes Shares in Shipping Amlwch Brewery Houses Household Fur-

Oxn

Stock of Horses Cows Hay &amp; Corn &amp;c. &amp;c. &amp;c.

"niture of evry discription where ever they may be found in this or any other Country &c. &c. and to pay in Twelve Months after my demise as folows:—

"Viz. to my Son George Bradley Roose 500

"to my Daughter Sarah Hughes Madyn 250

"to my Daughter Easter or Hester Owen 800

"to my Daughter Margaret Roose 1100

"with the Beed & Beeding she now } for her life  
"lyeth upon } & after  
"with a House in Amlwch called Synllan } return to  
"Bishops Lease } that to my  
"with the Sheeds &c. belonging thereto (l) } son Stephen and his Issue &c.

(a) The word "Of" was struck out with a pen.

(b) The words "belonging thereto" were struck out with a pen.





it was a finished and complete will, in the *deceased's* view and apprehension of it—in other words, would it result from the facts pleaded, that the deceased regarded it *as a will*, and meant it to *operate* as such in its present shape, and without doing any further act in order to give it testamentary effect?

In the latter of these events, this instrument *may be*, as in the former it *clearly is*, entitled to probate. But if both these questions are to be answered negatively, there is an end of the case. If the paper were "*a finished will*" in neither of the above respects, it is wholly invalid—it not being pretended that the deceased had not full time, and opportunity, to have rendered it a "*finished will*." He survived the writing of this paper upwards of four months—and is pleaded to have been "gradually declining in health for the last two years of his life, so as to have required the visits of a medical attendant during the greater part of that period"—and yet, not to have been "confined to his bed, until within about three days of his death." Under these circumstances—in this total absence of any "act of God," technically so termed, to prevent or obstruct its completion, this instrument can, I repeat, only be entitled to probate, either as being in itself, or as proved to have been, in the deceased's apprehension of it, a finished and complete instrument—in point of effect, that is—in its present shape.

1. Now, as to the first of these questions—the paper, upon the face of it, and taken by itself, is not, in my judgment, to be considered as finished and complete. It begins, "What I purpose to be my will"—that is—as I understand it, "what I

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intend to make my will *in futuro* ;" or "the manner in which I mean to dispose of my property, when I make my will"—not "what I constitute to *be* my will *in presenti*, and by this very instrument."

It signifies the same thing, to my apprehension, with "outlines of, or *memoranda* for, a will." With this interpretation of the *heading* of the paper, the *wording* of it, throughout, corresponds. It is not dispositive—it is not in the ordinary terms, "I give or bequeath"—it suggests to my mind, in every part, the notion of heads of a will to be drawn up at some future period, not the notion of a will itself. The interlineations and erasures, apparent in the body of the paper, and the want of subscription at the end, all confirm this notion of it.

2d. But, secondly, are the circumstances pleaded, sufficient to show that this was a complete and operative instrument, in the deceased's view of it?—for in this case, I have already said, that it will be equally entitled to probate, as in the former one. In answer to this question, it becomes necessary to state, and examine, the several circumstances from which this inference is sought to be drawn.

The second article of this allegation enters into a long and particular history of various advances made by the deceased to his several children ; and the next following article pleads the exhibit annexed to the allegation, being a paper book in the deceased's hand-writing, in which those several advances are set out to the account, separately, of each child. It should seem, that the deceased contemplated making a provision for each of his children, to the amount of, from a thousand to, twelve or thirteen hundred pounds—and the advances ac-

tually made to four of the seven during his life, together with the sums purported to be bequeathed them in this testamentary paper, make up something near that amount. For instance, the advances to the deceased's son, George Bradley Roose, are stated in the account-book at 750*l.* and 500*l.* is supposed to be bequeathed in the will—making up, together, 1250*l.* The advance to the deceased's daughter Hester Owen, namely, upon her marriage, is stated at 200*l.*—and the will purports to bequeath her 800*l.*—in the whole 1000*l.* The advance to Mrs. Mouldsdales on her marriage, is stated 1000*l.* accompanied with the following notice, “ N. B. This is all I purpose (*a*) giving to Ellen”—and accordingly *this* daughter is not benefitted by, or even mentioned in, the supposed will, though it bequeaths a legacy of 100*l.* to *her* daughter, the *grand-daughter* of the deceased. The deceased's son John Roose again, is in no sort benefitted by the will—but the advances set out to his account in the paper book, amount, together, to 1230*l.* The deceased's daughter Margaret (who, together with Stephen Roose, the party in the cause, are pleaded to be the only children of the deceased not settled in the world) is bequeathed 1100*l.* she having received no advance in her father's life-time. The several sums, indeed, carried to the account of Stephen Roose, amount to nearly 700*l.*—and the operation of the present paper is to give him almost as many thousands, to say nothing of the real es-

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(*a*) The Court observed, that there was no *constat* as to the time at which this purpose was expressed—it might have been many years before; in short, at any time subsequent to Mrs. Mouldsdales's marriage in February, 1811.

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tate—all the several supposed bequests, amounting to only \$3050. and the deceased's personalty being pleaded to have amounted, in value, to nearly 10,000. But the deceased's superior love and affection for this son is expressly pleaded, and must be taken as proved—and there are plain indications of his *floating* intentions, not to benefit his other children beyond the amount of, from 1000. to, 12 or 1300. as already stated.

Now the obvious inference from the facts alleged in these articles of the plea, and from the annexed exhibit, upon which so much stress has been laid by the Counsel *for* its admission, unquestionably is, that the dispositions contained in the paper propounded, under the circumstances, are not improbable—that they are conformable with the deceased's expressed intentions, and being so, are not *unlikely* ones for the deceased to have actually made. But to what does all this amount, as bearing upon the real question before the Court?—that question, it is to be remembered all along, being, not the probability of what the deceased *would* do, but the fact of what he *has* actually *done*. In my judgment, it amounts to but very little. It is good in proof of the deceased's intention to make a will, so disposing of his property—of the fact of his having finally made such a will, it is no proof. It is good in bar to any argument of improbability that might be urged against the paper, from the apparently unequal distribution of the deceased's property between his several children—but upon the real point in issue, namely, whether the deceased intended *this* paper to operate in its present form, and meant to do nothing more to give it effect—it bears very remotely.

2. The next circumstance relied on by the Counsel for the paper, is pleaded in the seventh article of the allegation, in the following terms :

“ That the deceased had been gradually declining in health for the last two years of his life, and was attended by Mr. Robert Williams, a surgeon in the neighbourhood, during the greater part of that period, but he was not confined to his bed until about three days before his death: *that* on the day after the said deceased had been confined to his bed by his said illness, and when he was in perfect possession of his mental faculties, the said Robert Williams, at the request of some of the family of the said deceased, asked him, the said deceased, ‘ if he had made his will,’ and the said deceased said, ‘ that he had done it,’ or words to that or the like effect. And the party proponent doth allege and propound, that the said deceased then alluded and referred to the paper propounded in this cause, as his last will and testament.”

Now admitting, for argument’s sake, what I conceive to be incapable of proof, that the deceased, on the occasion pleaded, referred to this identical paper; still, I am of opinion, that the reference itself will by no means produce the effect ascribed to it—that of converting this (apparently) unfinished, into a finished paper, this imperfect, into a perfect instrument—and that, on general principles, it would be extremely unsafe to ascribe this effect to it. Parties enfeebled by long illness, and on the verge of dissolution, often answer at random, and merely to avoid disturbance and importunity. By what I collect from the plea, the whole of what fell from the deceased on the occasion (in answer, too, to a

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query put by his *medical* attendant) was a mere general declaration in the affirmative. I presume, of course, that all which passed on the occasion, in substance at least, has been embodied in the plea.

The sole remaining circumstance insisted upon is, the place of finding, to which, however, I can attach no greater importance than to those preceding it. It is pleaded to have been found "within a ledger-book, in which the deceased kept his accounts, and had written entries very shortly before his death," such ledger-book being, together with other books and papers, locked up in a bureau, of which the deceased always kept the key.

Now this place of finding, to my mind, furnishes rather a contrary inference to that which has been contended for. It is found between the leaves of a ledger-book, which the deceased must be presumed, and is pleaded, to have been in the constant habit of turning over for making entries, and similar purposes. Surely it can't be contended, that *this* is the natural repository of a *will*, even though the ledger-book itself *were* locked in the deceased's bureau. It is just, indeed, the place where a man of business would dispose of a paper of the *deliberative* kind, such as I conceive this to have been. It is one of the last places which any man would have deposited a *will* for safe custody, which had received its final shape, and was an operative and effective instrument, in his view and apprehension of it, without any further act done, in its subsisting form.

That *this* instrument was such, is rendered, to my judgment, further improbable, by the circumstance of the deceased having died seised of real

estate. I consider it to have been the deceased's intention, that his son Stephen, should have *this*, as well as the residue of his personalty; "for I cannot accede to the supposition of one of the learned Counsel, that the deceased, by the term "estates," might mean his *personal* estates only, leaving his real estate to go, by regular descent, to his heir at law. I entertain no doubt whatever, looking at the whole context of the paper, and all the circumstances, that it was the deceased's intention (his floating and deliberative intention) at the time of writing this paper, that Stephen Roose, subject to the conditions named, should take his realty as well as personalty. Now if this be so, it is nearly conclusive against the supposition that the deceased meant, and intended, that *this* should operate as a final *will*; for though the deceased, as it has been observed, and as indeed it is to be collected from this *very* paper, was not a man of letters or of much education, yet, as a man of business and the world, one probably raised, *ex humili*, to a respectable rank in life by his own efforts and exertions, I can hardly suppose him to have been ignorant that the law renders the attestation of *three* witnesses necessary to every devise of *real* estate.

Upon the whole, I feel warranted in concluding, both that the paper propounded is, in itself, an *unfinished* paper, and that proof of the facts pleaded would be insufficient to justify me in deciding that it was any other than an *unfinished* paper in the deceased's own apprehension of it. Taking the paper to be unfinished in both respects, I have already said, that it could not be pronounced for; the deceased having survived the writing of it up-

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wards of four months, without any steps taken on his part to finish or complete it. I at once, therefore, adhere, to the practice of the Court, and spare the parties useless expence and anxiety, by rejecting this allegation. As for the consent of five, of the seven, next of kin to probate of the paper passing *as prayed*, of which something has been said in the argument, I need scarcely observe, that *this* is wholly immaterial to the case, in a legal point of view. Had the next of kin been much more numerous, any *one* of the number would still have had a perfect right to submit the validity of this paper to the consideration of the Court; and having been so submitted, it instantly became subject to those rules which Courts of Probate are bound to follow in determining cases of this description; and it was by the operation of those rules *alone*, that *its* fate could be ultimately decided.

Allegation rejected.

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EVANS v. KNIGHT and MOORE.

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(On the Admission of an exceptive Allegation.)

2d Session.

The admission of an exceptive allegation may be suspended till the hearing of the principal cause; when the Court will permit evidence to be taken upon, or will finally reject it, according as it then appears that the credit due to the witness attacked, is, or is not, essential to a right decision upon the merits of the principal cause.

**T**HIS question arose upon the admissibility of an allegation exceptive to the testimony of Edward Manwaring, a witness examined upon an allegation propounding certain "instructions," as *containing* the last will and testament of John Moore, the party deceased in the cause.



**JUDGMENT.****Sir JOHN NICHOLL.**

As the admission of this allegation must, unavoidably, tend to increased delay and expence, I shall be ill disposed to admit it if I can see reason to believe, that it may be dispensed with, in all probability, without detriment to either party. For the allegation, if admitted, provokes a counter allegation; and leads, consequently, to the introduction of several *new* issues, quite foreign to the *real* issue, and equally so to the *real* merits of the cause, which is before the Court.

The deceased in this cause died on the 24th of April, 1812, and probate of his will—that is, of certain instructions as containing his will—was granted to the executors on the 23d of the following month. That probate is called in, eight years after, in the month of April, 1820, and the executors are put on proof of the will in solemn form of law.

The plea propounding the will was admitted to proof in July, 1820. In the November following an allegation was admitted on behalf of the next of kin—as a further allegation has since been, on the same behalf, exceptive to the *character* of Edward Manwaring, a witness examined upon the executor's plea. The allegation now tendered to the Court is exceptive to the *testimony* of the same *witness*, who is charged to have deposed falsely in his answers to the 23d interrogatory (a).

(a) That interrogatory was as follows :—

Let Edward Manwaring be asked, did not you, some years ago, and when, live in the capacity of waiter at the Jamaica Coffee-house, kept by Mr. Grubb? Were you not discharged by the said Mr. Grubb, in consequence of his having detected you

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The instructions of which probate was granted, as *containing* the deceased's last will, bear date on the 21st of April, 1812. The drift of the adverse allegation is, that the deceased, at this period, was of unsound mind. It pleads in the 6th article, that "the deceased having, in the beginning of the month of April, 1812, been taken ill of the sickness whereof he died, continued daily to get worse, and was,

in the fact of stealing the wine from his cellar, or in consequence of his having accused you of so doing? Did you not afterwards obtain a situation as waiter at the Virginia Coffee-house, in Cornhill, kept by Mr. Strout? Were you not living in such situation at the period of the death of the deceased in this cause? For what reason were you discharged from such situation? Did you not, at or about the time when you were so discharged therefrom, offer for sale, or to pledge to — Underhill, who resided in —, some table cloths? Did not the said Underhill retain them, and carry them to Mr. Strout? Did you not, after you had been discharged from the Virginia Coffee-house, make proposals in the way of marriage to — Royle, who is a pastry-cook, and who resides near the Town Hall in the borough of Southwark? Was not such intended marriage broken off in consequence of impropriety of conduct on your part towards the said Royle? Did not the said Royle, in consequence of such your conduct, cause you to be arrested and imprisoned in the Fleet Prison? How long did you remain in such prison, and by what means were you liberated therefrom? By what means did you procure a livelihood after you had procured your release from such prison? Were you not soon, and how long afterwards, again imprisoned at the instance of the parish officers of some and what parish, for the expences occasioned by two natural children of your's, whom you were unable to maintain, or for some other reason, and what? When and by what means did you obtain your release from such imprisonment? Let the witness be reminded of the pains and penalties of perjury, and be further asked— Upon your oath have you not frequently, since your last liberation from prison, solicited and received alms? Have you not even received halfpence given to you in the way of charity?

during the latter part thereof, very frequently in a state of delirium—*that*, on the 19th of April, he was removed from the room which he had till that time occupied, and which was on the first floor of the house in which he resided, to a room on the second floor, in which room he continued to remain till his death—*that* from the period of such the removal of the deceased into the room on the second floor until his death, he was, from the violence of his disorder, in a state of almost constant delirium, which rendered it, very frequently, necessary for two persons to hold him—*that*, during the said period, the violence of his delirium occasionally abated for a short period, but his mind was so much weakened and affected, that he remained, in such intervals, totally incapable of knowing or understanding what he said or did, or what was said or done in his presence, and was rendered incapable of recognizing those about him; and, during such intervals, he was constantly subject to delusion and mental derangement, and was of unsound mind, memory, and understanding." And the next, the 7th, article, recites, that part of the executor's plea, which alleges the *factum*, &c. of the instructions on the 21st of April, 1812, which it contradicts, and pleads, *that* "the deceased was not, at the time the instructions bear date, nor at the time the same may have been drawn up and reduced into writing, of sound or disposing mind, memory, and understanding; nor did he, at any time, give verbal, or other, instructions, or directions for the drawing up of the same—*that* if the pretended instructions were, in fact, ever read over to the deceased, he did not know or understand the contents thereof—and *that* he did not set and subscribe his name thereto in testimony of any good

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liking or approbation of the same; nor did he, at the time the instructions were drawn up, or at the time the same bear date, know or understand what he said or did, or what was said or done in his presence, neither was he capable of giving instructions or directions for, or of making or executing, a will, or of doing any other serious or rational act, of that or the like nature, requiring thought, judgment, and reflection—that the deceased was, during the whole of the 21st of April, either labouring under violent attacks of delirium, or, in the intervals thereof, in a state of entire mental debility and derangement—so that he was not, during any part of the same, capable of entering into, or holding any rational conversation whatever.” The main issue, therefore, between the parties in the cause, obviously, is the deceased’s testamentary capacity on Tuesday, the 21st of April, the day on which the instructions were taken.

The article of the allegation, propounding the will, to which the witness Manwaring was designed, pleads, in effect, *that* on the day following that on which the instructions were taken, being Wednesday, the 22d of April, he, Manwaring, called upon the deceased, with whom he continued for about half an hour: *that* the deceased was *then* of sound mind; and *that*, in answer to a question put to him by Manwaring, he distinctly *recognized* the instructions given for his will on the twenty-first.

Now, whether the evidence taken upon this article of the plea, as to what passed on the 22d of April, is material, or the contrary, depends on the sufficiency, or insufficiency, of the evidence as to the deceased’s capacity on the preceding day. I think it not improbable that it is quite immaterial. No

fewer than nine other witnesses have been examined upon the plea—one of whom is vouched as having been actually present when the instructions were taken; and several are vouched as having seen, and conversed with, the deceased in the course of that, and upon subsequent days. It may possibly be, that their evidence renders the case, in favor of these instructions, too clear to require the subsidiary aid of recognitions in support of it: on the contrary, evidence of subsequent recognitions may be most material to the decision of the cause—should the evidence, that is, of the deceased's capacity, at the time when the instructions were taken, leave it questionable how far, resting upon such proof *alone*, they were entitled to probate. Under these circumstances I am disposed neither to reject, nor to admit, the allegation, but to suspend it till the hearing of the cause. If it should appear to be essential that the question of this witness Manwaring's credibility should be gone into, the Court will then rescind the conclusion of the cause, and suffer evidence to be taken on the allegation now offered. But if the Court can satisfy itself, either one way or the other, without going into further evidence as to the credit due to this witness, from the other proofs in the cause, it will be best for all parties that it should be finally dispensed with. I am the less disposed to the *present* admission of this allegation, as the general character of the witness has already been excepted to—and although I by no means lay down that the particular testimony of a witness may not be excepted to after an exception taken to his general character, yet I certainly recollect no instance of this *double* exception to one and the same witness. I may also

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observe that the interrogatory, in answer to which the witness is charged to have deposed falsely, has been merely put in order to furnish a test of the credit due to him, *generally*; and that it has no relevancy whatever to the question at issue between the parties in this cause.

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RITCHIE v. REES and REES.

3d Session.

An inventory and account may be dispensed with, if not applied for till after so long a period that, in conjunction with circumstances, it affords a reasonable presumption of the estate's having been fully administered.

RICHARD WALL died some time in the year 1777. In the month of November in that year, administration of the goods of the deceased (with the will annexed) was granted to Richard Rees, a creditor, upon the renunciation of Martha Wall, widow of the deceased, his sole executrix and universal legatee. Martha Wall survived her husband Richard Wall only a few weeks, and died intestate, leaving two children, a son John, and a daughter Martha. John Wall died in the year 1815, having first made his will, and appointed his wife, Mabell Wall, his universal legatee, but no executor. Mabell Wall died in the year 1819, without having taken probate of her husband's will, and appointed Archibald Ritchie *her* sole executor. Ritchie took probate of the will of Mabell Wall; and, subsequently, obtained letters of administration (with the will annexed) of the goods of John Wall; as also of the goods of Martha Wall, mother of John Wall, and universal legatee of the original testator. Martha Kell (formerly Wall) daughter of Richard and Martha Wall, and sister of John, was still living.

In the month of January in the present year, (1822) a decree issued, under seal of the Court, at the suit of Archibald Ritchie, calling upon Richard and Robert Rees, the sons, and executors of Richard Rees, who died in the year 1807, to exhibit, on oath, an inventory and account of the effects of Richard Wall, deceased.

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To this decree an appearance was given for the parties cited, under protest. It was objected on their parts *“that upwards of forty-four years had elapsed since the original grant of administration, with the will annexed, of the effects of Richard Wall, deceased, to their father, Richard Rees:”* *that “fifteen years had elapsed since the death of the said Richard Rees,”* *that “John Wall, as a representative of whom the said Archibald Ritchie called for an inventory and account, had lived till within the last seven years, without proceeding in that behalf;”* and *that “Martha Kell was then living, and neither had taken, nor was about to take, any measures to compel such inventory and account to be exhibited.”* And it was submitted, for the parties cited, *that “by reason of the premises, Archibald Ritchie, at whose promotion the citation was taken out, was not entitled to call upon them to the effect of the said decree.”* On the other side it was alleged, *that “Ritchie, the party proceeding, was, also, the legal personal representative of the universal legatee of the original testator;”* and *that the parties cited, “as the executors named in the will of Richard Rees, whilst living, the administrator (with the will annexed) of the goods of the said Richard Wall, deceased, were bound to exhibit an inventory of the personal estate and effects of the*

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deceased, and to render an account of the administration thereof, to the best of their knowledge and belief, when *lawfully* called upon so to do;" and that "by reason of no inventory or account thereof having been thentofore rendered, they were *lawfully* called upon in this respect by the party proceeding."

JUDGMENT.

Sir JOHN NICHOLL.

The persons from whom this inventory and account are prayed, are the representatives of a creditor administrator (with the will annexed) of the original testator: the person who calls for it, is the representative of his widow and universal legatee. He also, as executor of the widow, and universal legatee (there being no executor named in *his* will) of John Wall, one of the two natural and lawful children of the widow and universal legatee, of the original testator, she having died intestate, is interested in a moiety of the surplus, if any, of the original testator's estate; the other moiety belonging to the other of these two natural and lawful children, namely, a daughter, Martha Kell (formerly Wall) who is still living.

The letters of administration in this case were granted to a creditor forty-five years ago; and the creditor to whom they were granted, survived the grant thirty years, and has been dead fifteen, without, as it should seem, any demand of this nature having been made, either upon him, whilst living, or upon his representatives, since his decease. Now, although no statute, or rule of positive law, with which I am acquainted, has fixed any time certain, within which an inventory and account must be sued; still reason and justice prescribe some limitation to

calls of this sort, almost necessarily. If, therefore, this lapse of nearly half a century is not *pleadable in bar* to the present demand, still it may operate as a bar ; provided, that is, it can be taken, in conjunction with circumstances, to afford a reasonably strong presumption, that the estate has been fully administered and disposed of ; in which case I shall feel no hesitation in dismissing the parties from the effect of this citation.

What, then, are the opposite probabilities as to a *plene administravit* disclosed upon the face of the present petition ? In the first place, the renunciation of the widow and universal legatee, raises a presumption that the estate was insolvent ; in which case it must be fully administered, *quoad* this party at least, for he can have no interest, but in the event of a surplus. And this presumption is fortified by the time that has elapsed without any account prayed ; and by the circumstance of Mrs. Kell, who is entitled to one moiety of the surplus, if any, of the first testator's estate, still being no party even to this proceeding.

On the other hand, as against the first inference, it may fairly be urged, that the widow *might* be cajoled into suffering the creditor to take administration, by promises of a larger surplus, after payment of the debts, in the event of the estate being left at his disposal—a circumstance not improbable from her sex and condition. She, it appears, survived the deceased only a few weeks ; so that *she*, at least, had no opportunity of taking any further steps in the case. The parties entitled to the surplus, if any, after *her* death, were, at that time, minors ; the one under fourteen, and the other under seven years

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of age. As minors, and in indigent circumstances, it was little to be expected that *they* should compel the administrator to account for the deceased's effects: and when they attained, respectively, their majorities, the whole was a bye-gone transaction, and one, which probably *in their opinion*, it was too late attempting to investigate. For the condition of these parties, and their limited means of obtaining advice upon a subject of this nature, are circumstances not to be lost sight of, in estimating the presumptions and probabilities in this case, on the one side, and on the other. It is sworn, too, by Ritchie, that "Mabell Wall did, several times, call upon Richard and Robert Rees, the parties cited, relative to the affairs of the said Richard Wall, and that Robert Rees appointed a time for this appearer (Ritchie) to call upon him, with her; and upon the appearer afterwards calling upon him, he said, he had re-considered the matter, and should not give him any information relative thereto." All this very considerably repels the presumption of a full administration, arising from the non-claim of the several parties, successively, entitled to any surplus.

But, as with respect to the acquiescence of Kell, a circumstance is alleged, which not only furnishes a directly contrary inference, but is absolutely conclusive to the merits of the petition. For it is sworn by Ritchie, that "he hath been informed, and verily believes, the said Martha Kell, or her husband in her right, is now in possession of two houses, situate in Leather Lane, Holborn, in the county of Middlesex, which were a part of the estate of the said Richard Wall, deceased, or were purchased with monies arising therefrom."

Now if this be so, it is *conclusive*, I repeat, on the merits of the case. For it not only accounts for Kell's non-appearance, but is proof of a surplus in the hands of the administrator, or his representatives. For if there were *no* surplus, she could be entitled to nothing : if there were a surplus, she was entitled to only a moiety ; and the other moiety *should* have *been paid* to her brother, *or* his representatives ; which as it is not pretended to have been by the representatives of the administrator, I must presume it to be assets of the original testator, in their hands. At the same time this statement of Kell's possession of " houses in Leather Lane, which were part of, or purchased with monies arising from the deceased's estate," appearing, for the first time, in Ritchie's affidavit, without any allusion to it in the act of Court, I shall certainly afford the parties cited an opportunity of explaining, or denying, that statement in a further affidavit ; and I direct this matter to stand over, in order to afford them that opportunity. And as some doubts have been suggested,

1. Whether the party proceeding is entitled to call for an inventory and account, not having first taken a *de bonis* grant of the effects of the original testator ;
2. Whether the parties proceeded against are liable *so* to be called upon ; as the mere executors of a deceased administrator, and, therefore, not the personal representatives of the original testator ;

I shall reserve my opinion upon these points, till the whole question comes to be re-considered.

In the mean time the parties cited will do well to consider the propriety, on their parts, of complying with this citation, in the best mode in which they are able, even if they are not bound to comply with

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it, in strictness of law. The Court, in that case, would make every allowance, as to the sort of inventory exhibited—a matter, I apprehend, quite in its discretion. That these parties are not without the means of rendering an account of some kind, I infer from their own affidavit, which states, *that* “their father Richard Rees, duly administered the personal estate of the deceased, and fully completed the administration thereof, *within two years and a half after the death of the said deceased.*” The production of the documents (for such there must be) upon which their affidavit is founded, would probably be satisfactory, to the Court at least, if not to the party at whose promotion this citation is taken out, and, consequently, might set this question at rest.

The affidavit of the parties cited is *not* quite satisfactory to my mind, in several respects. It is extremely vague, relying much on time, and general presumptions, with little, or nothing, in the shape of specific averment. It does not even aver, specifically, that the estate was insolvent; but merely that “it was fully administered,” within a certain time. But if the estate were solvent, which as I have just said, is not, specifically, denied, it is clear that it is not “fully administered” at the present day. For there is no suggestion even of the distribution of any surplus to the representatives of the widow and universal legatee, which was essential to the complete administration of the estate, in any other event than that of its insolvency.

On a subsequent day two further affidavits were tendered from the parties cited—one, of the parties themselves—the other, of Martha Kell. The first of these stated, among other things, that “from certain books and papers of Richard Rees, their father, in their possession, they the appearers (Richard and Robert Rees) were enabled to swear, that the said Richard Rees fully completed the administration of the effects of Richard Wall, deceased, within two years and a half of his death; and also, that the said Richard Rees satisfied debts due from the estate of the said deceased to a *greater* amount than the value of his, the said deceased’s, estate. And they further made oath, that the said Richard Wall deceased, was not, at his death, so far as they know or believe, possessed of, or entitled to, any house or houses in Leather Lane, Holborn, in the county of Middlesex; and they disbelieve that any such were ever afterwards purchased with monies arising from his estate.” The appearers further made oath, in substance, that “they had always manifested a willingness to give every information in their power, relative to the affairs of the deceased, to the parties interested;” that “they had never made, and subsequently broken, any appointment with Mabell Wall, or Archibald Ritchie, as for the purpose of giving such information;” and that “since the death of Mabell Wall, the said Archibald Ritchie had made no application to them for information relative to the said deceased’s estate, otherwise than by the citation issued in this cause.”

The affidavit of Martha Kell, stated, that “she was intimately acquainted with Richard Rees’ administrator, with the will annexed, of the goods of

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her late father Richard Wall, the party deceased in this cause, and was then, and always had been, perfectly convinced, that, as such administrator, he fully and duly administered the said estate, and effects, which she verily believes were inadequate to the discharge of the said deceased's debts; and she further made oath that neither she, the appearer, nor her husband, then or ever, were in possession of any house whatever, which formed a part of the estate of the said estate Richard Wall, deceased, or was purchased with monies arising therefrom; and that the only houses which she, the appearer, or her husband, possess in Leather Lane, Holborn, in the county of Middlesex, are two houses which were devised to the appearer, under the will of her uncle Edward Pryce, late of Red Lion Street, aforesaid, which houses were purchased by the said Edward Pryce, at a public auction, in the year 1780."

JUDGMENT.

The further affidavits now exhibited, coupled with the other circumstances of the case, satisfy my mind, that this estate has been *fully* administered. Consequently, I am disposed to dismiss the parties cited, but *without costs*; as no inventory, or account, *in any sort*, of the administration of the deceased's effects, had been exhibited, or rendered, at the time of the issuing of this citation. The administrator was bound to exhibit an inventory, even though uncalled for: at least, he should have preserved an account of his administration, with sufficient vouchers; or have obtained releases from the parties entitled to any surplus of the effects, on their attaining, respectively, their majorities. The probability is, that by taking either of these precautions, he would

have saved his representatives the trouble and expence of this proceeding.

On the reserved points of the case, I am of opinion, 1. that the party proceeding, having an interest *in* the effects, *was* entitled to call for an inventory and account without *first* taking a *de bonis* grant *of* the effects of the original testator. The very object of the proceeding was to discover, whether there *were* any effects to which a *de bonis* grant could apply. I am also of opinion, 2dly, that the parties cited, as the representatives of the deceased administrator, although not, at the same time, those of the first testator, *were* liable to be called upon for such inventory and account; upon a reasonable presumption being raised, that any part of the effects of the first testator had travelled into their hands.

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TRINITY TERM,
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PREROGATIVE COURT OF CANTERBURY.

BEATY v. BEATY.

The presumption of law is against a testamentary paper, with an attestation clause, not subscribed by witnesses.—It is a slight presumption; but must be rebutted by some extrinsic circumstances, in order to the paper being pronounced for.

FRANCIS BEATY died on the 21st of March, 1822, leaving the following testamentary paper:—

“ I, Francis Beaty, purser of the Royal Navy, being of sound mind, and in perfect health, do make this my last will and testament, hereby revoking all former wills by me made.

“ I give and bequeath unto my beloved wife, Catherine Beaty, all my furniture, plate, books, linen, and all other property whatever in my house, No. 19, Dorset Street, together with the lease and fixtures thereof. I give also unto my dearly beloved daughter Catherine Beaty, one thousand pounds in the 3 per cent. consols; my wife Catherine Beaty to have the interest of it for her life, unless she wishes to give it up to her sooner; and I give to my wife, Catherine as aforesaid, all other monies I may have in the stocks, and all and every sum or sums of money that may be in the hands of Mr. William M’Inerheny, my agent, or that may be due or owing to me by government, and every other property I may be possessed of at my decease, I give unto my wife as aforesaid; and I do hereby appoint my wife, Catherine Beaty, sole executrix of this my last will and testament. In witness whereof

I have hereunto set my hand and seal this sixth day of June, in the year of our Lord 1820, and in the first year of the reign of his Majesty King George the Fourth, over Great Britain, &c.

"FRA' BEATY."

"Signed, sealed, and delivered }
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"It is my particular wish and request, that I may be buried as privately as possible, at seven o'clock in the morning, and without any more expence than is absolutely necessary.

"FRA' BEATY,

"June 6th, 1820.

"(a) Having given my dear boys a liberal education, and done what I could for them during my life, I now leave them with my blessing, to the care of their mother, and have not a doubt but she will (with the kind assistance of her friends) get them provided for and taken care of. May God bless you all.

"FRA' BEATY.

"6th June, 1820."

The above testamentary paper was propounded in an allegation tendered on the part of his widow, and relict, upon the admissibility of which the present question arose.

The allegation pleaded, in substance,

1. That the deceased died on the 21st of March, 1822, at the age of sixty-eight years, leaving be-

(a) This second memorandum was written upon a *separate* paper, but was found folded up with the other, in the deceased's writing-desk, after his decease.

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hind him a widow, and four children—three sons and one daughter.

2. The second article pleaded the *factum* of the will, on the 6th day of June, 1820.

3. The third pleaded that, subsequent to the making of the said will, to wit, in the months of January, February, March, and July, 1821, the deceased sold out the whole of the 1000*l.* 3 per cent. stock, of which he stood possessed when he made the said will, and which he had given, by the said will, to his daughter, Catherine Beaty, after his wife's decease; and that the sole property of which he *died* possessed, consisted, of the lease of a house in Dorset Street, his household furniture, and sundry articles of plate, not amounting in value, altogether, to more than 500*l.* or 600*l.*

4. The fourth article pleaded *that* "the said Francis Beaty, the deceased, sometime in or about the year 1819, having made a new will, requested Matilda James, a young lady who was on a visit at his house at Rochester, in the county of Kent, where he then resided, to witness his said will, to which the said Matilda James assented: *that*, thereupon, the said deceased produced a paper which he said was his will, and, at the same time, observed to her, that it had been *made* a long while, and that he only waited for some one to witness it, or words to that effect: *that* the said will having been previously signed by the said deceased, he then, in the presence of the said Matilda James, retraced his signature thereto with a dry pen; and the said Matilda James then subscribed her name, as a witness thereto: *that* about eight months before the said deceased's death, she, the said Matilda James, being

again on a visit at the house of the said deceased in Dorset Street, in the parish of St. Mary-le-bone, to which place he had then removed, he, the said, deceased, in the course of conversation with her, and alluding to the will which she had witnessed for him at Rochester, in manner as before pleaded, then observed to her, that he had ‘destroyed that will and *made* another will;’ and at the same time, remarked, that ‘he usually made a fresh will whenever an alteration took place in his property,’ or to that effect: *that*, on another occasion, happening about the middle of January, 1822, and being only a week before the deceased was confined to his bed by the illness of which he afterwards died, the said Matilda James, having called at the said deceased’s house, she found him, the said deceased, writing at his desk, in the parlour, where his wife and family were also sitting, and while the said Matilda James was engaged in conversing with the wife of the said deceased, he, the said deceased, occasionally joined in the conversation; and, alluding to the aforesaid will, which the said Matilda James had witnessed for him at Rochester, again remarked, that he had destroyed that will, *that* the said Matilda James thereupon replied, that he had better make another will, to which the deceased replied, that ‘*he had made another will* ;’ or then expressed himself in words to that, or the like, effect.”

5. and 6. The fifth, and sixth, articles of the allegation, pleaded the finding of the instrument in the deceased’s writing-desk, on the Sunday following his decease, in the same plight and condition that still belonged to it; and that the whole body, series, and contents, of the said will, &c. and, also, the

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several subscriptions thereto, were of the deceased's own proper hand-writing.

JUDGMENT.

Sir JOHN NICHOLL.

The paper propounded in this allegation would be clearly entitled to probate, but for the attestation clause. It is all in the deceased's hand-writing; it is signed and dated; it appoints an executrix; it is a complete disposition of personal property; and the deceased had no real estate to suggest to him the necessity of executing his will in the presence of witnesses. But if a testamentary paper be imperfect, either in itself, or in the writer's apprehension of it, it can only be entitled to probate, on proof being furnished of his having been prevented by, what is technically called, the "act of God," from completing it. As, therefore, the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed—the presumption of law is *against* a testamentary paper, with an attestation clause not subscribed by witnesses; where the testator is not proved, as he is not suggested even in the present case, to have been prevented by any "act of God" from going on to complete it, had he so intended. The presumption against an instrument, so circumstanced, I admit to be a slight one, where the instrument, like that before the Court, is perfect in all other respects. Slight as it is, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate, in its subsisting state; before it can be entitled to

probate (a), consistently with those established principles to which it is the duty of the Court to adhere.

(a) This was the doctrine of Courts of Probate respecting testamentary papers, which, though furnished with clauses of attestation, were, in fact, unattested, from an early period, till the decision of the Court of Delegates in the case of Cobbold and Baas.

The deceased, in that case, James Savage, had given instructions to an attorney to prepare a will. The attorney prepared it with several *quæres* and abbreviations, and the deceased made several alterations and interlineations in the draft. He afterwards, with his own hand, wrote the said will over fair from the draft, adding a bequest of the residue; and concluded as follows:—

“ In witness whereof I have to this my last will and testament, contained in three sheets of paper, to the first two whereof I have set my hand, and the last my hand and seal, this in the 16th year of the reign of our Sovereign George 3rd, &c. A. D. 1777.—Jam^s Savage.—Signed, sealed, published, declared, and delivered by the testator James Savage, as and for his last will and testament, in the presence of us, who have, at his request, and in presence of each other, set our names as witnesses hereto.”

The deceased had subscribed his name to each sheet, and affixed his seal to the last sheet. But the clause of attestation not being subscribed by witnesses, it was considered imperfect for that reason by Dr. Calvert, the then Judge of the Prerogative; and he admitted parol evidence, upon which he set aside the paper. On appeal, however, the Delegates, Sir W. Henry Ashhurst, Sir Beaumont Hotham, and Dr. Macham, were of opinion, that, it being a will both of real and personal property, it was, *reddendo singula singulis*, a perfect disposition of personal estate, and therefore a good will. Accordingly they rejected parol evidence against it, and reversed the sentence of the Court of Prerogative. [See 4 Ves. 200, *in notis*.]

This judgment of the Court of Delegates in the case of Cobbold and Baas may be considered to have governed, for some time, Courts of Probate with respect to testamentary papers.

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Now the circumstances which are pleaded in this allegation, are so far from *repelling* the legal presumption against the paper propounded, that they go far, in my mind, to *fortify* and *confirm* it. For, in the first place, it is pleaded, that the deceased, on the occasion of a former will which he had *made* and *signed*, "*a long while before*" retraced his signature, with a dry pen, in the presence of a person who subscribed, by his desire, her name as a witness; apparently as if considering the instrument incomplete, till that precaution was taken. This, to say the least, does not *lessen* the probability of his intending to perform a similar operation upon this

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so circumstanced, averse as they were to consider it *settled law*. But the authority of that case was held to be so shaken, not to say overturned, by inference and deduction from the decision of the Court of Review,\* in the case of Matthews and Warner,† that Courts of Probate reverted, without scruple, to the old doctrine upon this matter, which has been uniformly adhered to in subsequent instances: so that (and the editor considers it important, from the publicity which has been given to that case, to be rightly understood) the judgment of the Court of Delegates in the case of Cobbold and Baas is *now* held not to be law—the principle which governs this class of cases being that stated in the text.

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\* Consisting of Beilby, Lord Bishop of London; Lloyd, Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench; Sir Archibald Macdonald, Lord Chief Baron of his Majesty's Court of Exchequer; Sir William Scott, Knight, Judge of the High Court of Admiralty; Sir Giles Rooke, Knight, one of the Justices of his Majesty's Court of Common Pleas; Sir Soulden Lawrence, Knight, one of the Justices of his Majesty's Court of King's Bench; and James Henry Arnold and Christopher Robinson, Doctors of Law.

† See the argument upon the application for a "Commission of Review," in the case of Matthews and Warner, 4 Ves. 186. 211. It may be proper to add, that the Court of Review, in that case, reversed the two concurrent sentences of the Prerogative Court, and the Court of Delegates.

instrument; and that it was incomplete, in his view of the subject, till that operation was performed.

But it is pleaded, further, to have been the deceased's habit, according to his own profession, "to make a new will after every change in his property." Why this being so, there is a circumstance in the case which lays the strongest ground for concluding this paper, *designedly*, abandoned. For it is pleaded, that the deceased sold out, at different times in the year 1821, the thousand pounds, *consols*, which he possessed at the date of it, and had bequeathed by it, after the death of his wife, to his daughter. The probability therefore is, that he meditated a new will, and had abandoned this instrument; as well from his habit on similar occasions, as from the circumstance of its object being wholly defeated, and its plan wholly deranged, by the sale of his stock. By *this* paper the deceased's whole property stands bequeathed to the wife; the daughter will take nothing. It is perfectly true that the whole is but little; and that his sons, very contrary possibly to the deceased's intentions, will become entitled to share in that little in the event of his intestacy. But these are circumstances, which, in no degree, alter or detract from the principle that governs the case—a principle which it is the first duty of the Court to adhere to, uninfluenced by any such considerations.

The only circumstance which, in my judgment, can have a tendency to *repel* the legal presumption against the paper, is the deceased's declaration to Miss James, pleaded in the 4th article, that "he had destroyed his former will, and *had made* a new one." But the mere vague declarations of testa-

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tors, that "*they have made*" their wills, are not always to be implicitly relied on; and can never, standing singly, supply proof of *due execution*, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, and possibly often does, that "*he has made*" a will, when he has *written* a testamentary paper, however incomplete or unfinished that paper may be. In the present case, at all events, I cannot accept the declaration pleaded as sufficient to shew that the deceased intended *this* instrument to operate; when both the presumption in law, and the probability from the facts pleaded are, that he abandoned it.

Allegation rejected.

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2d Session.

If a will is before the Court, the validity of which is admitted, the Court will pronounce for it in preference to an alleged subsequent will, of the genuineness of which it entertains serious doubts.

The principles, what, upon which Courts of Probate proceed, where the inquiry is,

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Sir JOHN NICHOLL.

The present question respects the validity of an instrument, set up as the will of William Harcourt, late of the city of New Sarum, the party deceased in the cause, who died on the 22d of March, 1820. This instrument, which purports to bear date on the 4th of June, 1819, is propounded on the part of Sarah Susannah Saph, whom it constitutes the deceased's sole executrix. It is opposed by Mr. Atkinson and Mr. Westcott, the deceased's executors,

where the inquiry is, whether an asserted will was, or was not, the act of an alleged testator.

under a will dated the 24th of October, 1818, the genuineness of which is admitted on all hands.

The validity of the contested will in the present cause (in which, by the way, no fewer than seventy witnesses have been examined to the several allegations admitted upon either side) is not dependent upon the state of the deceased's capacity at the time of its suggested execution, but upon the fact of execution itself; the question being, whether the deceased ever executed it at all. For the case set up by the executors of the former will is, that the alleged latter will was *not* subscribed by, and is *not* the act of, the alleged testator. The contrary to this is, of course, advanced by the party propounding the instrument, upon whom therefore, as asserting an affirmative, the burthen of proof must be taken to rest. She it is who is bound to satisfy the conscience of the Court that the contested instrument *was* the supposed testator's own act; the law does not impose upon Mr. Atkinson and Mr. Westcott the burthen of furnishing proof that it *was not*.

Now, where the inquiry is, whether an asserted will *was*, or *was not*, executed by an alleged testator, all such collateral circumstances may be pleaded and proved, on either side, as have a tendency to shew, on the one hand, the probability, and, on the other, the improbability, that it *should have been* so executed. I allude to such circumstances as, the place in which the alleged will was found—the parties through whose agency it was prepared—its conformity, or the contrary, with the deceased's avowed, or presumed, testamentary intentions; and so on. A variety of such circumstances are actually pleaded to this intent, on either side, in the present cause; and to the evi-

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dence furnished upon the principal of these the Court will direct its attention, in the first instance, before it proceeds to consider the evidence more immediately applicable to the *fact of execution*, the main point in issue.

And, first, what is the evidence as to the circumstances connected with the *finding* of this instrument? Now, the circumstances under which a will is found, may, as we all know, tend, very materially, to its authentication. If, for instance, it is found locked up in repositories, to which the deceased only had access, and is produced from such by indifferent and disinterested parties, these are circumstances which, as tending to *connect* the will with the testator, are strongly confirmatory of its genuineness and authenticity. The disputed will, in *this* cause, has no advantage of that description: its first production, after the deceased's death, is *by* Mrs. Saph, the sole executrix, and party principally benefited under it—from *where* remains to be answered. But the testator's *former* will (from which this latter was *avowedly* drawn up, by her son, Mr. John Saph) is admitted *not* to have been in the deceased's possession, at the time of his death; but at Mrs. Saph's house, and in Mr. John Saph's custody. Something might be observed as to what passed when inquiry was first made for that former will. Mr. John Saph's answer, to say the least, was by no means explicit. That answer impressed the inquirer with a notion that he asserted the instrument to be *destroyed*. He explains himself as having *meant* to assert, not that the instrument itself was *destroyed*, but that it was revoked, or that its effect was annulled. After admitting, however, the exist-

ence of the instrument, he was somewhat reluctant to produce it; and, at last, only did so in compliance with the recommendation of his solicitor, Mr. Dew. Something might also be said as to the *mala fides* of the Saphs, in endeavouring to *snap* a probate, as it is termed, in breach of their engagement to take no step of that nature, till *after* the funeral of the deceased. Both these last, however, are mere out-lying circumstances, and will go little to impeach the credit of this transaction, unless it shall turn out, that they are connected with others of the same colour and complexion. At the same time I cannot fail to observe, that here, in the very outset of this inquiry, I encounter somewhat of deviation, on the part of those who set up this instrument, from that straight-forward path, in which truth and fairness are accustomed to proceed. But,

Secondly, to consider the parties agent in this transaction, namely, Mrs. Saph and her family. For the Court is under no difficulty, in the present case, as to *who* are the fabricators of this instrument, if it be fabricated; they can be no other than the identical parties, who are vouched to the *factum* of the instrument, as a genuine one. Now, had these parties any *inducement* to attempt, and did they possess any *means* to effect, the fabrication of an instrument of this description? As to *inducement*, there was every inducement of which the nature of the thing is capable; for the will purports to bequeath the intire bulk of the deceased's property to the Saph family. And although the three members of that family, who attest the execution (one of the three being also the *writer*) of this instrument, take no direct benefit under it, still that circumstance,

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as I shall have occasion presently to observe, leaves the question pretty much where it stood before, as to this matter of *inducement*. As to the *means* again, it must be admitted that these parties were in possession of fully sufficient information to *get up* an instrument of this description; for to say nothing of their long personal connection with the deceased, his former will, from which this latter is manifestly drawn up, was avowedly in the possession and custody of the Saphs at the time of his death.

That Mrs. Saph was not altogether indifferent about obtaining a will in her favor, is obvious from the evidence of Pleyer, who lived in the deceased's service from Michaelmas 1817, to the summer of 1818. She deposes to having heard Mrs. Saph speak to the deceased about his will, one evening *before* he had the paralytic stroke. "She wished," she said, "he would do something more for her; and he replied that he should not; for he had done enough for her already." She says, that "*after* the said deceased had had the paralytic stroke, Mrs. Saph used often to rub his hands with mustard, and other things, to recover the use of them again; and that, on such occasions, she used to say to him, that she wished she could get him the use of his hands again, so that he could write; for she did believe that then he would do something more for her, by his will." Now, the evidence of this witness proves two things; first, that Mrs. Saph was sufficiently alive to her own interests; secondly, she was withheld by no scruples, of delicacy at least, from trying to promote them. Nothing of all this, however, appears to have made any impression upon the de-

ceased; for it is in evidence that he made and executed *two subsequent* wills, in neither of which he acceded to Mrs. Saph's claims, or paid the slightest attention to her applications.

Now, if Mrs. Saph was still dissatisfied with the trifling provision, to which only, as I shall presently shew, she stood entitled under the deceased's last (genuine) will, is there any thing, let me inquire, *in special*, that is, in her station or character, which in any sense, *negatives* the probability of her having been tempted to have recourse to a fabricated one? Mrs. Saph was a married woman, living (possibly not through her own fault) separate and apart from her husband, with a large family, and, I presume, in necessitous circumstances; for it seems, that after the discharge of Pleyer, the deceased's *last* servant in 1818, she was the deceased's sole attendant, and performed even the menial offices of his house. She is obviously therefore not so elevated as to be above all suspicion of fraud, on the score of wealth or condition. Her character will best disclose itself in the future stages of this inquiry. Is there any thing, again, in the stations or characters of the agents, through whose instrumentality the fraud, if any, was effected, to render this violently improbable? The writer of this will was Mr. John Saph, the son of this Mrs. Saph; and it is attested by him and his brother and sister, strictly, a family party. Of these, all that I shall at present say is, that Mr. John Saph's induction into life was through the medium of an attorney's office, which he quitted in consequence of a most disgraceful transaction; and I find no trace in the evidence of his having redeemed his character, at this time, by any part of

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his subsequent conduct. There is nothing, at least, in *his* station or character which precludes the probability of fraud. Looking then at the *inducement* which these parties had to fabricate a will, and at the *means* which they possessed of fabricating one, especially in connexion with Mrs. Saph's, even avowed, claims upon the deceased's testamentary bounty ; I do not mean to say that either *her* station and character, or those of the writer and attesting witnesses, amount to affirmative proof of *this* being a fabricated will ; but I do say, and I would be understood to mean no more, that there is nothing in these, *in special*, that is, to *negative* the probability of its being such—nothing to render it, either highly incredible, or even very unlikely, *à priori*. The instrument propounded, therefore, has indeed the ordinary presumption against fraud in its favor ; but that is, strictly, all.

But, thirdly, as to the *dispositive* part of this will ; for, in determining the probability of any will being the act of an alleged testator, the Court is, in all cases, naturally led to consider the disposition made by it. The disposition purported to be made by the will propounded, is so important a feature of the present case, that the Court will consider it, both generally, and in detail. And the Court, in this case, is not left merely to *presume*, or *conjecture*, what the deceased's testamentary intentions might have been—it has the benefit of *two* prior wills, *declaratory* of his testamentary intentions, or at least of what these were at a period not much anterior to the date of this instrument, with which to compare the present disposition.

Now, upon a comparison of the deceased's *two* former testamentary acts with the present instrument, in this respect, it will plainly appear that his mind and intention, as to the disposal of his property, had undergone, within a short period, a complete revolution, supposing the present instrument to be, in truth, his will. The two former wills, the one dated in June, the other in October, 1818, are, in substance, as to their dispositive parts, precisely the same. By both, the bulk of the property is bequeathed to Mr. Westcott and his family; some bequests, rather honorary than beneficial, are made to Mr. Atkinson and *his* family; a considerable sum is devoted to charitable uses. Mr. Atkinson and Mr. Westcott are the trustees and executors in both wills; as the latter of these gentlemen, Mr. Westcott, is the residuary legatee. Mrs. Saph and her family are legatees to more than a trifling amount in neither of the two. By the instrument propounded, these dispositions are nearly reversed—Mrs. Saph and her family are bequeathed the great bulk of the deceased's property; Mr. Westcott and his family are nearly excluded; Mr. Atkinson and his family are wholly so; even the honorary legacies to these last are omitted; so are the charitable bequests; Mr. Atkinson and Mr. Westcott are no longer executors or even trustees; Mrs. Saph, who is *also* the residuary legatee, is the sole executrix. All this implies a complete revolution of testamentary mind and intention, in order to estimate the probability of which it is necessary to see, whether it can be fairly accounted for by extrinsic circumstances.

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And here, in the first place, it is *not* to be accounted for by any caprice or fickleness of the deceased in this respect, that can be collected, at least, from the variations between the two instruments of June and October, 1818. *They*, on the contrary, go to shew the very reverse; for they are trifling in themselves, and satisfactorily explained. By the will of June, a house in Green Croft Street, after a life interest to one Webb and his wife, is given in remainder, together with a legacy of 10*l.*, to a Mrs. Heyley; and a Mrs. Jeboult is bequeathed 100*l.* In the course of that summer, however, this Mrs. Heyley appears to have set up a demand against the deceased, as entitled to some property under the will of his late wife; which it appears that the deceased borrowed money (in part of Mr. Atkinson) to discharge. In return, the deceased, by the will of October, withdraws his testamentary bounty from Mrs. Heyley altogether, and bequeaths the freehold interest, before devised to her, to Mrs. Jeboult, in lieu of her pecuniary legacy. It seems too that there was an erroneous description, in the former will, of a joint note of hand, given by the deceased and Mr. Westcott to Mr. Atkinson, it being described in that will as due to Mr. Gray—in the latter will that error is corrected, and it is *described* to be due (as the fact was) to Mr. Atkinson. These are the sole, and the trifling, variations between the two instruments; by the latter of which, the bulk of the disposition contained in the former is ratified and confirmed: and the *two*, together, furnish evidence of *fixed* testamentary intention infinitely beyond that which could be supplied by any single testamentary act. Any single testamentary act *might* be the result of sudden whim,



or temporary impression ; but this confirmed act—the will of June, thus ratified by that of October—establishes, on a solid foundation, the deceased's *then* fixed testamentary intentions, and renders a sudden change in these, as to the bulk and general tenor of the disposition, highly improbable, unless most satisfactorily accounted for.

Nor, to pass, for an instant, from the *matter* to the *form*, is any inference, in favour of the last will propounded, derived from comparing it in this respect, any more than in the former, with the *two* prior wills. A particular investigation of the mode, and manner, in which the contested will is said to have been drawn up, and executed, belongs to another place. It will be sufficient, in this place, to observe, that these were highly *informal*, as contrasted with those adopted in the framing and execution of *both* the other two. In respect of both these, the deceased availed himself of the agency of his confidential solicitor, Mr. Wilmot, who had acted for him, as such, for twenty years before ; who had been employed to draw up, and attest, the will of October, as well as that of June, 1818, though the former varied from the latter only in those trifling particulars to which I have just adverted ; who had also prepared and attested the will of his deceased wife in 1808 ; and who was actually resorted to by the testator himself, upon *other* business, in August, 1819, subsequent, that is, to the date of the will propounded on the part of Mrs. Saph.

But to proceed to consider the *probability* of this change in the deceased's testamentary intentions, the first, indeed, I may say the only, previous intimation of which, is contained in the deposition of

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Mr. John Saph. For to no other human being can the deceased be shewn to have expressed himself, as dissatisfied with his former testamentary arrangements, made and confirmed so recently, or as intending any alteration in these, than to Mr. John Saph. True it is, indeed, that Mrs. Saph has pleaded, that the deceased, "intending to revoke his will of October, 1818, and being dissatisfied with his solicitor, Mr. Thomas Wilmot, who had drawn it up, conversed with John Petty, clerk to the said Thomas Wilmot, thereon, and asked him, 'what he would charge for making a new will?' But when Mr. John Petty, the person so vouched, comes to be examined upon this allegation, he, positively, and explicitly, denies the whole transaction; or that the deceased ever made any such application to, or enquiries of him. He says, that he was a subscribed witness to the deceased's will of June, 1818, by mere accident, being at that time, not a regular clerk, but a sort of extra writer, in the office of Mr. Wilmot during the bustle of a general election only; and that, to the best of his knowledge and belief, he never was in the deceased's company or society upon any other occasion. This total negation of the fact, so alleged, by the witness Petty, to say the least, has no tendency to dispel the clouds of suspicion that hang upon Mrs. Saph's case.

Before I proceed to any ulterior consideration of the probability of those alterations, it may be advisable to state them, somewhat more detail.

The deceased, however, I should premise, at the period of these transactions, was far advanced in life, nearly, I believe, eighty years of age, but in

possession of his full mental faculties, as also of tolerable bodily health; for he was walking about, and at market, within a day or two of his death, nine months posterior to the date of this contested will. He was afflicted, indeed, with erysipelas, and with something of paralysis, especially in the hands; which required to be rubbed, as stated in Pleyer's evidence, with mustard, &c. to give him the free use of them. Hence, he was averse to writing, though not totally disabled from it; and Mr. John Saph, who was sometimes employed to receive his rents, occasionally, also, signed receipts for them, in his (the deceased's) name. The deceased was a widower, and without children. His wife died in 1812; having first by her will, which was made in 1808, left the bulk of her property, after the death of her husband, to Messrs. Westcott and Atkinson; so that these gentlemen were *her* executors and trustees, as well as those of the deceased, under the two prior wills. Mrs. Saph's maiden name was Mundy. The Mundys and Harcourts were somehow related; and the deceased and his wife appear to have been upon friendly terms with the father and mother of Mrs. Saph, though resident at some distance from Salisbury. The deceased's wife had stood godmother to Mrs. Saph; and she and her husband took notice of, and were kind to her, both when a school girl, at Salisbury, and when, after her marriage and separation from her husband, she was left, with a large family, in narrow circumstances, in more mature life. With all this, however, Mrs. Saph was no object of *Mrs.* Harcourt's testamentary bounty. Whatever was her connexion with, and whatever were her claims upon her, *she*, by her

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will, left her nothing. The deceased, after his wife's death, keeping only one female servant, Mrs. Saph, who lived near, used from that time frequently to be at his house; attended him, in particular, in his sicknesses; and no doubt contributed very much to his comfort. On Pleyer's discharge, in 1818, she became his sole attendant. In the previous year, 1817, as well as in 1818, she and her daughter, Ann Saph, had accompanied the deceased to Lymington. The deceased, in return, paid great attention to Mrs. Saph, and was kind to her children, especially to this daughter Ann; occasionally also employing her son Mr. John Saph. The deceased, it is to be observed, however, had returned from Lymington, *before* the will of October, 1818; and although, in the intervening time between October, 1818, and the date of the new will, he had gone to Weymouth, accompanied by Mrs. Saph and her daughter; yet it does not appear that, either on their journey, or during the rest of the interval, there was any marked difference in the *sort* of intercourse between the deceased and the Saphs, from that which had been going on for, and during, several years *prior* to the wills of June and October, 1818. And now to state these purported alterations in the deceased's testamentary intentions, as a test of their probability, somewhat more minutely.

The first alteration respects the house in Green Croft Street. This, I have already said, was given, by the will of June, to Mary Heyley; and, for the reasons stated, to Mrs. Jeboult, by the will of October, in lieu of her pecuniary legacy of 100*l.* It is now, however, taken from Mrs. Jeboult (no legacy being substituted for it), and is given to a

Mrs. Crocker, who turns out to be a married daughter of Mrs. Saph, and in no particular favour, or habits of intercourse with the deceased, that I can discover. For the probability of *this* alteration, not an argument even has been advanced; except that general one, of the deceased's increased regard for the Saph family, which I shall consider, once for all, presently.

The next alteration is an interchange between the houses given to Mrs. Saph and Mr. Westcott. By the wills of June and October, 1818, the deceased had given a house in Church Street, *adjoining that* in which he resided, to Mrs. Saph, for her life, with remainder to her son and daughter, James and Sarah Saph; and the house in which he resided, to Mr. Westcott, with remainder to his son William Westcott, charged with the payment of 100*l.* due from the testator and Mr. Westcott to Mr. Atkinson, on a joint note of hand. These devises are now interchanged; the last mentioned house is devised to Mrs. Saph, in lieu of the first; the first mentioned, *and with a similar charge*, to Mr. Westcott, in lieu of the last. Now it happens that the testator's own house is worth about five times as much as the adjoining one, described merely as a cottage; the life interest of Mr. Westcott in which is, actually, not worth the sum charged upon it. Mr. Westcott, at the same time, is excluded from any other benefit or trust under the will; and Mrs. Saph is substituted, as the sole executrix, and residuary legatee.

In order to account for these alterations, an attempt has been made to set up, (still in conjunction with the deceased's great increasing regard for the

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Saphs) something of disaffection towards Mr. Westcott. But to what does the evidence furnished on this head amount? why, merely to this: that the deceased did, sometimes, observe, that Westcott was imprudent, and might have been richer, and provided better for his family. Expressions, however, of this sort, are not only of little weight, in themselves, but being proved to have occurred, as well *before* the wills of June and October, under which he is the principal legatee, as *subsequent* thereto; they do not confer a shadow of probability on his virtual exclusion under this third will. It is an alteration, I conceive, highly improbable in itself; and in no degree rendered less so by this attempt to account for it, by diminished esteem, on the deceased's part, towards the Westcotts.

Nearly the same observations apply to the case of Mr. Atkinson, and his family, as under the *three* wills. Under both the former wills, this gentleman was an executor, and trustee. His daughter and himself had pecuniary legacies, rather complimentary however, than any objects to them, as matters of property. His sons and himself had pieces of plate, carefully ticketed by the deceased, in his life-time to distinguish them. In this third will all these bequests are omitted, even those of the pieces of plate, so ticketed, as I have described; nay, more, many of the articles, themselves, I observe, are not included in Mrs. Saph's declaration, instead of an inventory, upon her oath, furnished in the February of the preceding year; and what has become of them, *non constat*. The attempt which has been made to shew that Mr. Atkinson was losing ground in the

deceased's esteem, wholly fails. He was a very old friend, both of the deceased himself, and his wife; he was executor and trustee of both; he had advanced money to the deceased only recently, to enable him to satisfy the demand of Mrs. Heyley; he held a power of attorney to receive his dividends; and the deceased is proved to have made kind enquiries about him, during his absence in Scotland, after the date of the will propounded, and down to the time of his own death. For the probability of *this* alteration, therefore, we have still nothing to refer to, but the deceased's great regard for the Saphs.

The next alteration is that respecting the disposition of the *bank stock*. The deceased, by both his former wills, had given and bequeathed "*so much of his bank stock as should produce 60*l.* per annum,*" to the minister and churchwardens of the parish of St. Edmund, Sarum, to be divided between six *poor* persons—three *poor* men and three *poor* women, with direction, that if Mrs. Saph chose to apply as one of these latter, she was to have a preference. Any *bonus* payable on the said bank stock after his decease, he bequeathed to Mr. Gray, and the residue (being about 3*l.* 16*s.* a year each) to Mr. Gray, and the three junior Mr. Atkinsons. Under the will propounded on the Saphs part, all these bequests are swept away: "*the produce of 800*l.* bank stock,*" is bequeathed to Ann Saph, the daughter, and "*the remainder*" is given, specifically, to Mrs. Saph, the mother.

An observation upon the wording of this purported legacy of the bank stock, will be more in place in a subsequent stage of this enquiry. Meantime, how

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stands the probability as to the substitution of Mrs. Saph and her daughter, in lieu of the charities. Now it appears that charitable bequests, of some sort, had been *long* projected by the deceased. He had long purposed building alms-houses, a purpose, it should seem, not wholly relinquished at the very latest period of his life. Under these circumstances, his abandoning altogether any bequest of the kind, is, in *itself*, highly improbable.

But, superadded to the improbability that the deceased *should have* sanctioned any such total abandonment, we have his own positive averments, subsequent to the date of this will, that he *had not done so*. The witness, Nash, states, that "in conversation with the deceased about the house adjoining his own, then under repair, the deceased said, 'he had had some thoughts of pulling it down, and building alms-houses there; but that he had given that up, as building was too fatiguing for him.' The deponent observing, 'he was sorry for it,' the deceased said, 'I have left,' or 'I will leave,' the deponent did not understand which, 'in lieu of it, a weekly allowance to so many poor people.' The deponent said, 'I hope you will not forget it, Sir,' to which the deceased replied, speaking very quick, and with great earnestness, 'why I have done it.'" This conversation the witness fixes in the latter end of September, 1819. Again, the witness, Randall, who had been long intimate with him, deposes to having taken an opportunity of saying to the deceased, upon whom he had called for the poor rates of the parish, 'You used to talk, Sir, about the money you meant to lay out in the parish for charitable purposes;' the deceased said, 'my mind is quite

easy and satisfied upon that head; I have made my will, and have given the sum you and I used to talk about, for the benefit of the poor; you'll hear more about it hereafter.' The deceased further said, 'you are a young man; if you live you will know more about it, on some future day. I have left it to the vestry, or to the minister and churchwardens, to distribute, and you will have something to do with the distribution of it, one day if you live'—alluding, as the witness understood, to the probability of his being churchwarden, at some future period." This was in August, 1819, the month preceding that of the deceased's declarations to Nash.

Why, if the testator really made these averments, and was sincere in making them—independant of their bearing upon the question of probability, there is nearly an end of the case set up by Mrs. Saph, upon another score—for they amount to distinct recognitions of the former will, to distinct disavowals of the alleged latter one. Of the sincerity of these, however, on the testator's part, I see no reason whatever to doubt; and the witnesses who have deposed to them, Nash and Randall, are perfectly unbiassed, and perfectly unimpeached.

The whole, then, of these alterations, which I have thus gone through in detail, are highly improbable in themselves, and that *last* considered is, also, at variance with the deceased's express subsequent declarations. We have seen that the attempts, in special, to account for them in two instances, have wholly failed; it remains only to consider that sole remaining, and general salvo for all difficulties, set up in the deceased's alleged great (and in process

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of time, it should seem nearly exclusive) regard for the family of Mrs. Saph.

And here, it may freely be admitted, that, from Mrs. Saph's long connexion with the deceased's family, and long attendance upon his person—from her constant and unremitted exertions, to contribute to his comfort, especially during his latter years—no surprise could have been excited, in the mind of the Court, by any provision that the deceased might have made for her, in a will that stood *per se*. The Court would, most unquestionably, have declined putting its own estimate upon the value of her services—services which only the deceased was qualified duly to appreciate. But the Court has before it an undoubted *constat* of the value of those services, in the deceased's estimation, at a period only shortly anterior to the date of the will propounded, in the wills of June and October, 1818. And what, upon inquiry, does this turn out to be? Why, it is to be collected from the will of June, ratified and confirmed by that of October, that the deceased, notwithstanding the urgent instances of Mrs. Saph with him to consider her claims, and services, had deliberately fixed the value of those services, in his estimate, at a devise of the cottage and garden adjoining his own residence to her, for life, with remainder to her two youngest children, and a recommendation that she, on application, should be preferably entitled as one of the six poor persons, to whom, as already noticed, he had appropriated 10% a year each, in the way of charitable bequest. What he had given her, in his life-time, in remuneration of her services, does not exactly appear. According to some of the

witnesses, as, for instance, Mrs. Gilbert, he had been *very liberal* to her, and her family. According to his own declaration, as deposed to by Pleyer, "he had done enough for her." Be that however as it may, this is the whole given to her by the will of June, confirmed by that of October, 1818. As a ground, then, of probability for the high rate at which these are estimated in the will now propounded, all merits and services on her part, all declarations and kindnesses in return, on his, either at Lymington or elsewhere, *prior* to this will of October, 1818, are done away—*they* go, but they go no farther than, to that will. The vastly higher rate at which they are estimated in this last will, than in that of October, can only be satisfactorily accounted for, in my mind, by some great accession, either of desert on her part, or of regard on his, or of both these together, *between* the dates of the two wills, of which I don't see a vestige in the evidence—I should rather, indeed, say, between the date of the first of these wills, or the end of October, and the beginning of March: for it should seem from Mr. John Saph's evidence, (of which presently) that the deceased expressed to him his intention of altering his will *three months* before that intention was actually carried into effect; so that the deceased's *mind* must be considered as having undergone the change or revolution so to be accounted for, *between* the end of October and the very beginning of March. But I can discover nothing, in this interval, in the nature of cause, to which any such effect can be reasonably ascribed; there occurred in it nothing more, that I can perceive, than the same attentions, on the one part, and returns of kindness and good

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will on the other, that had been interchanged between the same parties for years before. Yet this last will (to state, more explicitly, what that change or revolution is) purports to bestow on Mrs. Saph, and her family, in lieu of the trifling provision made for them under the former wills, the whole of the deceased's property, real and personal, to the utter exclusion of the former objects of his testamentary bounty, whose places they alone occupy. I say, the "*whole* of his property," and to "*the utter exclusion*;" for I can scarcely consider that the few legacies given *away* from the Saphs, furnish any virtual exception to this mode of speech; being of trifling amount, and precisely such as the generality of fabricated wills are found, by way of *colour* to contain.

Upon the whole result, then, of this examination into the evidence furnished upon each of the principal circumstances disclosed on either side, in proof of the probability, or improbability of this contested will being the deceased's own act, the presumption, I must say, is very strongly *against* the instrument. I now come to the more direct evidence applicable to the question of whether it be such or not—a question upon which nothing that has been hitherto advanced, is, in any sense, decisive. For a case how unlikely and suspicious soever, in itself, may be irresistibly proved by the force of testimony. Evidence may be such, as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish.

The present case is one of a somewhat painful

nature to determine. Upon questions of capacity, which, perhaps, most frequently occur in this Court, the evidence, in great part, is commonly reconcilable. For evidence upon capacity being, chiefly, evidence upon a mere matter of opinion, witnesses who differ most may depose, upon a question of capacity, with equal sincerity. Here, however, the Court will be under the absolute necessity of withholding its credence from the principal witnesses, that is, from those to the factum of the instrument, in the event of pronouncing *against* it. At the same time, it by no means feels itself driven to the alternative which has been pressed upon it in argument, of either pronouncing *in its favour*; or of determining, affirmatively, that the instrument is a forgery, and that those are perjured who have attempted to sustain it. The presumption of law, and burthen of proof, are different in the case of a civil inquiry, (which is the character of the present proceeding) and in that of a criminal prosecution, under which, alone, charges of forgery, and perjury, can be duly investigated. On charges of forgery, and perjury, the presumption is in favour of innocence; and the weight of any doubt that may arise in the investigation of those charges belongs, most unquestionably, to the parties accused. Here the presumption is in favour of the former will, the validity of which is admitted—so that the Court, instead of giving the latter the benefit of any doubt (which, as I have just said, those who support it would be entitled to, if arraigned upon a criminal charge) is bound to give it the other way, namely, upon the admitted will. I apprehend that this distinction is sufficiently real, to enable me to pronounce *in favour* of the admitted

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will, without going the length of deciding, affirmatively, the asserted one, to be a forgery. I proceed then to consider the direct evidence applicable to the alleged execution of this instrument.

Now the sufficiency of that evidence to sustain this transaction, necessarily depends on the credit, both general and particular, due to the witnesses who speak to it; and upon the character, as to its intrinsic probability, or the contrary, of their narrative.

Who, then, *are* the witnesses by whose immediate testimony this instrument is to be sustained? and how do they stand affected? and, first, as in point of general credit.

The witnesses upon the *condidit* are two of the sons, and a daughter, of Mrs. Saph, the party principally benefitted under the will propounded. They are competent witnesses, as not having, themselves, a direct, pecuniary, interest in the event of the suit. At the same time they can, by no means, be considered, unbiassed ones. A direct interest, of the smallest amount in value, would preclude them from being witnesses at all; so jealous is the law of the purity of evidence. At the same time it is obvious, that these parties are under much stronger inducements to support this transaction (and were, originally, to embark in it) than a trifling legacy would have furnished; though this last, as I have just said, would have destroyed their *competency* as witnesses, whereas the "*stronger inducement*" only goes to their *credit*. But though the law (which can only draw its line between interest, and no interest) permits witnesses who are so circumstanced as the present are, to be heard; yet it even requires them to

be heard (as indeed common sense does) with a very considerable deduction from the *credit*, to which they might be otherwise entitled.

And here, by the way, it strikes me as a little singular, that these three Saphs should *be* competent witnesses; or, in other words, that *they* should be the only members of the family unnoticed in the deceased's will. Their very competency is an argument, to my mind, *against* the genuineness of this transaction. Why should the deceased exclude these alone of all Mrs. Saph's children from any participation of his bounty? James and Sarah have the reversion of the deceased's house; Elizabeth (Crocker) has the reversion of the house in Green Croft Street; Ann has the Bank stock; but John, Robert, and Sarah, have nothing, which is the more extraordinary as to the first, since it appears that he was something in the confidence of, and much employed by, the deceased. That *the deceased* should have omitted them expressly, as for the purpose of making them witnesses, (which is the only solution of the difficulty) is, in itself, most improbable; as he could be at no loss for neighbours and friends to attest his will, even though he had not thought proper to confide in Mr. Wilmot to prepare it. Their exclusion, therefore, is a circumstance, which it is extremely difficult to account for, on the supposition of this being *the deceased's* act. But is it equally unaccountable in the *other* alternative, namely, that it was not the deceased's act, but a fabrication of Mr. John Saph? By no means—That *he*, either should not venture, or could not contrive, to embark three *indifferent* persons in a transaction of this nature, is extremely likely: as it also is, that he

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should have picked up something about *legatees* not being *competent* witnesses in his attorney's office. The *making* these three Saphs, therefore, *attesting witnesses*, and the omission of any benefit to them, in order to their being such, is perfectly reconcilable with the notion of this instrument being a fabrication—irreconcilable as it is with the notion of its being a genuine, and authentic, instrument.

The above observations go to the *general* credit of the attesting witnesses, *collectively*. I now proceed to consider the credit, both general and particular, which is due to each of them, taken separately. And first, for Mr. John Saph, who must be admitted to have been the *principal* actor in this transaction, whether it be false or genuine.

And here, in the first plea, how does Mr. John Saph's credit stand affected by his *general* character? Now it is difficult to conceive, a person whose credit is more shaken by what appears of his general character (which has been formally excepted to) than Mr. John Saph. His absconding from Mr. Winch the attorney's office, with some of his employer's money, is a particular fact, which is spoken to by witnesses on both sides, and, indeed, is not attempted to be denied. After so absconding from the service of Mr. Winch, he set up in business as a maltster, at Calne; where his sisters Elizabeth and Jane appear to have lived with him. His *particular* transactions at Calne, being differently represented by the witnesses, I endeavour to shut out of my mind; but there are several witnesses from Calne, who must be presumed to have had means of knowing him, and who swear, that, from their knowledge of him, generally, they would not believe him

upon his oath. And other persons, from other places, who are acquainted with, and have grounds for forming an estimate of, his character, depose to the same effect. Of the witnesses, on the other hand, produced in support of his character, some say "they do not know what character he bears," and consequently prove nothing. Others admit that they have heard "reports to his disadvantage;" and, therefore, prove worse than nothing. Others, indeed, express a more favourable opinion of him, but the Court, for reasons that will presently appear, can place no implicit reliance upon their testimony. The result, in short, of the whole evidence, as to this person's *general* character, is, that it affects his credit very materially: so that whatever proceeds from the mouth of such a witness, even upon this consideration only, requires *strong* corroboration before it is entitled to belief. The Court is bound, however, to resort to his evidence, he not being an incompetent witness in law. It is, in substance, as follows:—

He says, that "living in Salisbury, at but a short distance from the deceased (with whom his mother had resided for the last three years of his life *as his housekeeper*), he was in the habit of calling upon the deceased daily, or nearly so. That on one of such occasions, the deceased told him, he intended to alter his will; but that he should not employ his attorney to alter it, for that *he* had ill treated him. This might be about three months before the execution of the new will. After that, he repeatedly mentioned to the deponent, whom he knew to have been writing clerk to an attorney for about three years, that *he* should alter his will for him. In

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April, 1819, he drove the deceased, who was accompanied by the deponent's mother and sister, Ann, as far as Blandford, on their way to Weymouth; on that journey, the deceased told him, before his mother and sister, that he should alter his (the deceased's) will for him, when he returned from Weymouth. In the latter end of May, the deponent met the deceased, accompanied as before, at Blandford, on his way home, and drove him back to Salisbury. In this journey the deceased said, that the deponent should *now* alter his will for him. The deponent thinks they returned the 26th or 27th of May. On the following morning, the deponent called upon the deceased, and mentioned to him the subject of his will, when the deceased said, 'he might as well give the instructions for it at once.' This was about nine o'clock in the morning; no other person was present. Pens and ink were on a table, standing in the middle of the room, from a drawer of which the deceased took and gave the deponent some paper. The deceased began by saying, that 'he had, by a former will, left a certain sum to charity, but he said that he should give part of that sum, namely, *eight hundred pounds bank stock* to deponent's sister, Ann Saph, and *the remainder of such sum*, to deponent's mother, Sarah Susannah Saph, independent of her husband Robert Saph, and to be at her sole disposal.' He said, that 'he should bequeath *the* house given by the former will to a Mrs. Jeboult, to Mrs. Crocker, and her heirs.' He further directed, that the deponent's mother should be his sole executrix, and residuary legatee, still, independent of her husband, as before. He directed the deponent to omit a legacy of 200*l.* to a

Mr. Atkinson, and to leave out every thing given to the said Mr. Atkinson, and his family. He further said, that ' he would give the house in which he lived to the deponent's mother, for her life; with remainder to her two youngest children, James and Sarah, instead of to Mr. Westcott, to whom it was given by the former will; and that he, Mr. Westcott, should have the adjoining house, which was given by the said former will to the deponent's mother, Mrs. Saph.' The deceased *then* got up, and took out his former will from a cupboard in the room, in which they were sitting, and gave it to the deponent, telling him, ' to write it over again with the aforesaid alterations.' The deponent, after he had written the aforesaid instructions, read them over loud enough to be heard by the deceased (who was rather deaf) distinctly; and when he had finished, the deceased said, ' that will do—that will do; that's all right.' The deponent, having prepared a new will from such instructions and former will, went with the same to the deceased, about three days after; he found him alone, and read it all over to him; the deceased then took, and read, or appeared to read it, all over, to himself. The deponent said, that he would procure a light, which he accordingly did, when the deceased, having taken some wax from the ink-stand drawer, melted the same, and made a seal at the end of the will, impressing the same with the initials of his name, from a seal hanging to the watch which he wore in his fob. He then told the deponent, that ' his brother and sister, Robert and Jane Saph, should be two of the witnesses to his said will, and that when they were both at home together, and at leisure, he would

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execute his said will,' which the deponent left with him. The deponent had made one or two drafts before completing the said will; but which he destroyed, as well as the instructions so taken from the deceased as aforesaid, when he had completed it. He goes on to depose, that being with the deceased on the evening of the 3d of June, the deceased told him, if his brother and sister Robert and Jane were at home at breakfast time, the following morning, to bring them with him, and he would then execute his will. On the following morning the deponent went to the deceased accordingly, and was followed by his said brother and sister, who came in about nine o'clock; the deceased's will was then lying on the table, he having previously taken it from the cupboard, and placed it there; his mother was the only other person present. The deceased then 'perused the first sheet of the will, mentally, and having so done, he took the pen and ink, and signed his name thereto; the deponent then took the pen and ink, and wrote J. S. being the initials of his name, in the margin of the said sheet, and desired the said Robert and Jane Saph to write their respective initials, which they did.' This was repeated, as to each of the four sheets; the deponent, and his said brother and sister, *also* subscribing their respective names, at the foot of the attestation, written on the fourth sheet. The deponent's said brother and sister then withdrew, and the deceased, without saying any thing, took the will, and went up stairs, whence, he shortly returned to the deponent and his mother, but did not mention the will again; having, as the deponent believes, left it up stairs. As the deceased never enquired for his former will, the deponent kept

the same in his possession, until after deceased's death."

Such is the history of this transaction from its outset to its final completion, as stated by Mr. John Saph. I shall first briefly advert to some improbabilities in his narrative, taken alone; and shall then compare two passages of it, which afford the Court that opportunity; the former, with the evidence of another witness in the cause; the latter, with the face and appearance of the instrument itself.

In the first place, then, the mode in which these instructions are first communicated, as stated by this deponent, strikes me as a little improbable. According to this witness's account, the deceased had the whole matter of the new will so completely arranged in his own mind, that he communicates full instructions for it without hesitation, from memory only, and without any reference whatever to any written document. For it is not till *after* the instructions are so delivered by the testator, and taken down by the witness, that the former will is fetched from the cupboard. So *accurately* are these instructions, however, given on the one hand, and taken on the other, that when read over to the testator, on being reduced into writing, not an alteration, not a correction, suggests itself—the testator says, "that will do—that will do—that's *all* right."

The witness goes on to say, that, having prepared a new will from these instructions, he took it to the deceased about three days after. The will, so prepared, is then read over, first to, and after this by, the deceased, to whom, again, although no intermediate draft had been submitted, not a syllable that requires any alteration presents itself. The witness

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at Calne, where he went to see him; but he does not say a syllable as to any actual or imputed *misbehaviour* during his residence there. Again, in answer to the 12th interrogatory, he had said that "in 1818 Mr. John Saph kept a school in Salt Lane [Salisbury], and continued to keep it till the deceased's death; he thinks he has left off keeping it about a twelvemonth; during the greater part of *that time he has been living with the respondent at HIS house.*" Now the deposition of this witness was not finished at one sitting—it broke off at the end of the 13th interrogatory. On the following day, after answering the 22d interrogatory, he desires to amend his answer to the 12th interrogatory (as to his cousin John Saph's occupation, &c. during the last three years), by adding thereto, that "he, Mr. John Saph, had, within the last three years, and particularly within the last twelvemonth, repeatedly been visiting at the respondent's mother at Stapleford; and that he had, also, within that period, been paying his addresses, in the way of courtship, to a young lady at Ringwood, &c." Being asked by the examiner whether, subsequent to leaving him on the preceding evening, he, the witness, had seen Mr. John Saph, he replied, that, "having a dangerous road to pass, John Saph accompanied him home, he, the respondent, being on horseback, and John Saph on foot; and that they had returned, in the same manner, nearly half-way to Salisbury from Stapleford, a distance of seven miles, that morning; *but* the respondent declares, that in obedience to the strict injunction of the examiner not to say one word respecting this cause to any person whomsoever, he had not said one word to John Saph, nor

John Saph to the respondent, in any way or manner. What he now adds to his deposition is the consequence of his own reflections." All this *may, possibly, be* very true and sincere; but the general complexion of this witness's deposition (which I have considered with much attention) by no means disposes me to think that *it actually is so*.

It is said, and very truly, that in *vivâ voce* examinations, the Court and Jury have the benefit of *seeing* the witness, and of collecting, from his manner and deportment, whether the substance of his evidence be true or false. This advantage is denied to *our* mode of examining witnesses; but then it has others, with which examinations of witnesses in open Court, *vivâ voce*, are not attended. It affords us an opportunity of considering, *maturely*, the story which the witness has told, *deliberately*—of balancing the parts of that story one with another, so as to form an adequate opinion of its probability or improbability—finally, of inspecting its *general tone* and *character*—which last to those, the habit of whose life it is to consider written testimony, may ordinarily furnish as accurate a test of the forwardness or shyness of a witness, of his proneness to add or suppress, and the like, as his manner and deportment could do if the witness himself were examined in open Court—where, it may be added, very erroneous impressions of these are, sometimes at least, liable to be formed, from the mere embarrassment of witnesses, of a certain character, under that course of examination. All this, independent of the benefit of deliberately

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weighing and comparing the stories told by *different* witnesses. But to proceed.

Mr. James Gilbert deposes, on the 8th article of the allegation, *that* "being one day in Salisbury after he had gone to reside at Clarendon, and in the latter end of 1814, or the beginning of 1815, John Saph came to the deponent, and asked him, if he would be a witness to Mr. Harcourt's will? *that* Mr. Harcourt had sent him to ask—the deponent replied that he would—a day was fixed, and the deponent attended; and, together with the said John Saph, saw the said William Harcourt execute his will, in the parlour of his, the said deceased's house, in Church Street—he does not recollect that any other person was present; the deponent understood that Mr. Wilmot, of Salisbury, the solicitor, had made such will."

Now is the above statement, relative to this witness attesting a *former* will of the deceased, one upon which the Court can depend? There is no trace of any such former will in any part of this cause; neither John Saph nor Mr. Wilmot, whom the witness *understood* to be the drawer of such will, *make* any mention of it; nothing about it even is suggested in the interrogatories. The transaction itself is most improbable. If this "*former* will" had been prepared by Mr. Wilmot, how came he not to attest it himself, as he had the deceased's *other* wills, and the will of his wife, which he had also prepared? Again, the deceased had *real* estate; so that it is most improbable that he should have executed a will in the presence of *any two only*, much more of *these two*, witnesses. Lastly, John Saph had absconded from Mr. Winch's in April, 1814, and was

at Calne at the specified period of this transaction, namely, the latter end of 1814, or beginning of 1815. All these circumstances taken together, render this statement, I confess, somewhat incredible in my opinion. It has strongly the semblance at least of a pure fabrication; as by way of laying a ground, and to account, for other particulars in his evidence, which he might think in want of something of the kind to introduce, or usher them in.

This witness goes on to state, that "subsequent to the execution of that will [that is, of the will which he so states himself to have attested, as above] and prior to the time when Mr. John Saph applied to the deponent to witness another will, *the time more particularly he cannot recollect*, the deceased complained of Mr. Wilmot to the deponent." He said, that "he had made him pay a large bill for making his will; that he should never make another for him, or do any other business. The deceased told the deponent that he could get a will made for a guinea. The deponent said, that *he* could get a will made for nothing; any body could make a will for *him*."

Now, here again, with respect to these declarations against Mr. Wilmot, are they genuine, or are they mere inventions to lay a ground for the deceased's alleged employment in this behalf of Mr. John Saph? They have much more the appearance of the latter than of the former, in my apprehension of them. In the first place, this witness takes a wide range as to time; only fixing them as having been made *sometime between 1814 or 1815, and 1819*. The *probability* should seem, that, if made at all, they were made soon after the transaction of the former will, i. e. in 1814 or 1815; that being

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the will, of course, I presume, with Mr. Wilmot's charge for preparing which, it is meant to be inferred that the deceased expressed himself so highly dissatisfied. In the course of three or four years that dissatisfaction would, probably, have worn-off; and the circumstance itself would, probably, have been forgotten. But unless these declarations are fixed as having been made subsequent to October, 1818, they prove nothing; if made, the deceased departed from them in his employment of Mr. Wilmot to draw up the two successive wills of June and October, 1818. He departed from them, indeed, at any rate; for it is in evidence that Mr. Wilmot was professionally employed by the deceased in August, 1819; subsequent, that is, by three months to the date of this will propounded by Mrs. Saph.

This witness, Mr. John Gilbert, further says, that "one day, just before the deceased executed the will in question in this cause, John Saph came to the deponent at Clarendon, and informed him that Mr. Harcourt wished him to come and be a witness to his will, which the said John Saph told the deponent, he, the said John Saph, was making for him. The deponent told him, that if it was a market day, he should have no objection; and added, that there was no occasion for him to come down, that his, the said John Saph's, brother and sister would do as well; any body would do for witnesses; or to that effect. The deponent asked the said John Saph what was in the will; but he said that he had promised Mr. Harcourt not to tell; and he did not."

Here, at length, then we arrive at a part of this witness's evidence, directly at variance with, and contradictory of, and that in no more unimportant

particular, the evidence of his cousin and fellow-witness Mr. John Saph. In the first place we have seen that, according to the evidence of the latter witness, this notion of procuring Robert and Jane Saph to attest his will, originated with, and proceeded solely from, the deceased; without being proposed to him by the witness, or any other, and without the deceased himself, as in the first instance, designing Mr. Gilbert or any other person to that office. The witness Gilbert, on the contrary, represents this as having been recommended by *him*, and as having proceeded from *his* suggestion. But whatever may be said of this inconsistency, secondly, the evidence of the witness Gilbert as to the message, &c. from the deceased, upon this head, is utterly irreconcilable with Mr. John Saph's parallel evidence by any process that I can apply to it. Is it possible, that if this person had really gone over to Clarendon with any such message as that spoken to by Gilbert, at the express desire of the deceased, the circumstance itself, and every thing connected with it, could wholly have escaped his memory? But not a syllable respecting it occurs in *his* deposition, though taken eight months before that of Gilbert. Not a word is said about "witnesses," according to his statement, till the will is drawn up and sealed; and then, the deceased, himself, proposes his brother Robert and his sister Jane, and never adverts to any other.

Now which of these two witnesses the Court is to believe, or whether either are credible, is not very material. It is quite sufficient that Mr. John Saph's evidence not only is not confirmed, but is invalidated by Gilbert's contrary evidence. Nor

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does this last witness's deposition, as contended, necessarily connect the deceased with the execution of this instrument. The passage relied on as having that effect being that which immediately follows the one just recited, is in these words, "The deceased, when the deponent next saw him, a week or two after, or perhaps longer, observed to the deponent '*you did not come,*' alluding, as the deponent believes, to the deponent's not having attended to witness his will." Now, as to this passage confirming the truth of the transaction, or amounting to a *recognition* of this instrument by the deceased, it does nothing of the sort, even admitting it to be genuine. All that it makes the deceased say to Gilbert is, "*you did not come;*" *that* might as well have been said if Saph, or any other, had told the deceased, that Gilbert was coming over to Salisbury, and would dine, or drink tea, with him, or would see him for any other purpose, or upon any other business. But, in the next place, I have strong doubts whether the deceased said any thing of the sort, or, whether the whole matter of this last passage is not a mere *after-thought* between these two witnesses. I suppose it an *after-thought*, because the circumstance deposed to is wholly *extra articulate*; there being no such circumstance pleaded. And although, where little or no intercourse subsists between a witness and a party, a circumstance sometimes comes out in evidence, with greater effect, from its *not* having been stated in plea; still, in the present case, considering the intimate connection between this witness and the Saphs, and considering that he is *vouched* in the article to the having been applied to *as* a witness,—his not having been vouched to, at

the same time, nor the plea averring, this supposed recognition of that application, strongly inclines me to suspect the whole of it to be, what I have already termed it, a mere matter of *after-thought* between these two persons.

I have only one other observation to make upon the evidence of Mr. John Saph: it results from a comparison of his narrative, not with that of any other witness, but with the instrument itself. He says (in substance), that "in three days after the instructions were taken [namely, on the 27th or 28th of May] the will was finished, and submitted to the deceased, who read, &c. and affixed his seal to it, as already stated, when the instrument was left in his possession ready to be executed; *but no time of execution was proposed.*" He further says, that "being with the deceased on the evening of the 3d of June, the deceased told him, he would execute it *next morning.*" Until the evening then of the 3d of June, it should seem from this statement, that the execution was neither fixed, nor even proposed for the *fourth*; but this statement the instrument itself contradicts, and is at variance with; for, upon the closest inspection of the instrument, I can perceive no trace of a blank having been left for the date, and of the date having been, *subsequently*, supplied: the *whole* instrument appears to have been written *uno contextu*; and the date to have been inserted at the time when the body of the instrument was written.

This circumstance, coupled with the others already noticed, is decisive, in my judgment, and prevents me from placing any sort of reliance upon the truth of the narrative contained in the deposition of this

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witness, Mr. John Saph, or upon the reality, so far as it depends solely upon that narrative, of the transaction itself.

It is argued, however, that if Mr. John Saph is *discredited*, there are still two other unimpeached witnesses to the fact of execution, upon whose testimony the Court is bound to rely, even if it is under the necessity of rejecting his. But here, in the first place, it is observable, that it is not merely the *general credit* of this witness that is impeached, but the truth of his *particular narrative*. The very foundation, consequently, of the whole transaction is shaken; a circumstance, this, which affects the credit of *all* the witnesses. In respect to these other two Saphs, again, although it is true that *their* general characters are not liable to the same objections that apply to that of Mr. John Saph, yet they are equally biassed witnesses in this particular transaction, as having the same expectant, if not direct, benefit. They are, also, equally, or nearly to the same extent, *implicated* in this fraud, if it be one; and to the penal consequences of failing to sustain it, they are all three liable in common. And not only are they biassed and implicated witnesses, but there is a "*suppressio veri*" in the deposition of one at least of the two (on a point not immediately connected with the *factum* of this instrument), which, independent of other considerations, by no means tends to create a favorable impression, on my mind, of the credit due to them.

It is in evidence that this young woman Jane Saph actually resided with her brother at Calne. Now, whether he behaved ill, or whether he was used ill there, as Gilbert represents, she must have known that he went to Calne upon quitting Mr.

Winch's, where he set up as a maltster; and that he got into disputes, and was under difficulties at Calne. She must also have perfectly known the circumstances under which he left Mr. Winch's. Yet in answer to the fourth and fifth interrogatories, she deposes, that "she does not know whether her fellow-witness and brother John Saph left Mr. Winch's service voluntarily, or whether he was discharged therefrom; neither does she know upon what account it was, if he was so discharged. She does not recollect into what trade or business he went, after leaving Mr. Winch's employ, nor where he immediately afterwards lived; that he has been, occasionally, absent from home, but not for long together; that she has never known her said brother to be involved in debt, nor insolvent, &c. &c." This, I repeat, is a *suppressio veri*, upon a collateral point, by no means creditable to the witness. Nor am I at all satisfied that the brother Robert is wholly clear of the same imputation. He was examined in August, 1820, and *then* stated himself to have been seventeen years old in the December preceding: he was, therefore, between eleven and twelve when his brother was discharged from Mr. Winch's service in April, 1814. He, however, professes the same utter ignorance of all the circumstances attending that discharge as the last witness; an ignorance which I can hardly suppose to be real, considering his age at the time; and that the whole family have been residing together, at *Salisbury*, nearly ever since. So much for the general credit due to these witnesses; and now for the particular credit due to their account of the transaction in dispute.

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In proportion as these two witnesses have been less connected with that transaction than the witness whose narrative of it has been already examined, the means of the Court to ascertain the truth, or to detect the falsehood of *their* narratives, are obviously abridged. One or two observations, however, occur, as upon the face of the account given by these two witnesses of the act of the execution.

The counsel for Mrs. Saph have argued much for the genuineness of the transaction, and consequently of the instrument under review, from the three witnesses concurring strictly in their account of the manner in which this instrument was executed by the deceased. The truth of the premises I am ready to assent to; in the propriety of their inference I am not disposed, unreservedly, to acquiesce. Concurrence up to a certain extent, most unquestionably, evinces truth and sincerity; but the instant that it savours of *preconcert*, it operates the other way. Now these witnesses concur in stating one circumstance at least, to an extent, that savours strongly of *preconcert* in my judgment. They *all* depose that the deceased read over the will apparently to himself, or, as one of the witnesses expresses it, mentally, and then executed it, sheet by sheet; that is, that he so perused, and then signed the first sheet, which the witnesses attested by their initials; and so, of the remainder; repeating this cumbrous and operose process (no very likely circumstance in itself) four times; the instrument consisting of as many sheets. Now that all the three witnesses should not only remember this circumstance, but should remember to specify it with the particularity which they all do, in their respective

depositions, does savour strongly of preconcert, considering who these witnesses are, and how they are connected together. The mode of executing the instrument (sheet by sheet) is, I have already said, no very usual or likely one for the deceased to have adopted. It is, too, I may further observe, not very probable that the deceased, an old man of eighty, should have *perused* the will at all, mentally or otherwise, at the instant of execution. The deceased himself had given instructions for it, which, when taken, were read over *to*, and approved *by* him. The will itself, when drawn up, was also read over first *to*, and then *by* the deceased, at the time of his affixing his seal to it. The deceased had the intermediate possession of it from that time to the time of execution; an interval of at least three days. All this according to the evidence of Mr. John Saph. That the deceased, under these circumstances, should have perused this instrument as they describe him to have done, in the presence of these three witnesses, whom he must have kept waiting, accordingly, during the operation—one of the three, a young apprentice, pressed into this service of attesting the will during an interval in which he had merely stepped home for his breakfast—is a little unlikely.

I am not aware that the depositions of these two witnesses suggest any further material observation, nor am I willing to press against them, to any thing of a harsh extent, the one or two remarks which they have actually suggested. It will be quite sufficient to observe, that the testimony of these two witnesses—so biassed—so implicated—so not devoid of suspicion upon the face of their testimony—by

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no means furnishes the evidence of their fellow-witness, Mr. John Saph, with that sort of corroboration of which it stands in absolute need in my judgment: and, in conclusion, I may safely dismiss the evidence upon the *condidit* with this general remark:—It is very far from satisfying the moral conviction of the Court against all the probabilities which have been already stated, that this, really and truly, was the deceased's own act.

Before actually dismissing it, however, it may be requisite that the Court should redeem its promise of saying a word as to the purported legacy of the "Bank stock" to Ann Saph, apparent on the face of this instrument.

The deceased, Mr. Harcourt, jointly with his wife during *her* life, was a holder of Bank stock, which, as long back as 1790, had amounted to 594*l.* stock, and which had increased, by bonuses, to 742*l.* 10*s.* stock, producing, as at 10 *per cent*, an annual income of 74*l.* 5*s.* The dividends were received by Messrs. Hoares, of London, and carried to the credit of Mr. Atkinson; who accounted for the amount, from time to time, to the deceased. Out of this same Bank stock he had given, by the wills of 1818, "*so much as would produce 60*l.* per ann.*" to a purpose, and "*the remainder*" in a manner, already stated. This third will, however, purports to bequeath "800*l.* Bank stock" (worth nearly 2000*l.* and more by 57*l.* 10*s.* of that stock than the testator had to bequeath) to Miss Ann Saph, and "*the remainder*," specifically, to the mother Mrs. Saph. Why, here again is a circumstance utterly inconsistent with any notion of this instrument being the deceased's act; but easily reconcileable with the

supposition of its being a fabrication of these Saphs, which it is admitted that it must be, if it be not the act of the deceased. The deceased, who, of course, was fully acquainted with the nature and properties of Bank stock, could not but have *discovered* this obvious blunder whilst *repeatedly* perusing, first the *written* instructions, and then the will itself, as already observed; granting even that he might have *committed* it, by *saying*, as deposed to by Mr. John Saph, that he should give his sister Ann "800*l.* Bank stock," and "*the remainder*" to his mother, in the first instance. But there is no improbability in the commission of this blunder by the Saphs; *they* may well be supposed ignorant of the rate of interest payable on Bank stock; and as it appeared by the former will that the deceased had more than sufficient Bank stock to produce 60*l.* *per ann.* (which itself at 5 *per cent.*, the standard rate of interest, would require 1200*l.*), *they* might very naturally conceive that the deceased's interest in that fund was quite sufficient, to *cover* these several bequests of "800*l.* Bank stock," and "a remainder."

An attempt, however, a last attempt, has been made to support the credit and character of this instrument, by what are technically called "recognitions;" that is, by declarations or acts of the alleged testator *referring* to this instrument. *Previous* acts or declarations, as of dissatisfaction with his former will or the like, there are none, excepting the declarations spoken to *singly* by Mr. John Saph; which, for reasons that need not be repeated, are entitled to no sort of consideration from the Court. But still clear and distinct *subsequent* recognitions of this will, proved as clearly and distinctly by

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witnesses above exception and suspicion, might alter the whole complexion of this case, and carry irresistible conviction to the mind of the Court that the paper set up in it is, what it asserts itself to be, the deceased's *will*. It is material therefore to consider, both who the witnesses are that speak to them, and what the asserted recognitions, themselves, amount to.

Two witnesses only (besides Mr. James Gilbert, the supposed recognition, contained in whose deposition, I have already said, giving it credit, amounts to nothing) have been relied on in this respect—a Mrs. Betsy Bursey, and a Mrs. Elizabeth Gilbert.

Bursey, by business, a dress-maker, at Lymington, is the intimate friend of Mrs. Saph, whom she confesses to have “assisted her memory” in some things relative to which she has been subsequently examined; she has been active too in collecting testimony in the cause. Now I do not mean to say that these are circumstances which would, at all, induce the Court not to take this person's oath to a mere matter of fact; but they are circumstances which do induce the Court to listen to her with some degree of suspicion, when she is brought to speak to expressions said to have been used by the deceased several years before—expressions liable to misapprehension, possibly insincere, and certainly not unlikely to be distorted and exaggerated in the deposition of a witness, whose scanty memory, in respect of them, is admitted to have been eked out by that (or the *invention*) of Mrs. Saph. The declarations too, themselves, when accurately considered, amount to little or nothing; they are either equivocal or immaterial; and by no means directly

come up to what I am bound, in law, to consider distinct recognitions of this will.

Mrs. Gilbert's evidence is of still less weight. She is the sister of Mrs. Saph, and the mother of the witness James Gilbert, whose evidence has already undergone the investigation of the Court. Her deposition is open, in its outset, to the same remark which was applied to that of her son; that of bearing a strong internal character. For instance, speaking of her nephew John Saph, she says, that "he misapplied some of his master's money, which she considers a mere frolic of youth; she believes him to be a good young man." Such is *her* moral estimate of the transaction at Winch's; and of her nephew's general conduct and character. Again—her examination broke off at five o'clock upon a Monday, and she was appointed to attend the examiner at seven o'clock on the same evening. Instead of this, however, she does not in fact so attend again until the Wednesday evening following, at the same hour, by reason, as pretended at least, of indisposition; and then, after forty-eight hours "recollection," as she terms it, she desires to amend her deposition, as taken by the examiner, upon the second article of her sister's allegation. Now that deposition, as already taken, was pretty minute as to favors conferred by the deceased upon her sister Mrs. Saph; but, after an interval of two days (admitted by her to have been spent at the Saphs, in the company of both mother and son, though she, too, protests to the examiner that not a syllable was exchanged between them on the subject of the suit, after that interval I say) for "recollection," she comes out with a long story, wholly extra articulate,

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of Mrs. Saph having shewn her about *Christmas*, 1818, three notes of hand (as she calls them), given to her by the deceased; the one for 100*l.*; the other for 30*l.* odd; and the third for 25*l.* She says, that *after this* (consequently in 1819) she heard the deceased Mr. Harcourt say, that a very unpleasant thing had happened to him, relative to a Mrs. *Alic* (to whom he had left 10*l.* by his will) appearing to be entitled to some houses and land under the will of his late wife, which he (Mr. Harcourt), conceiving them to belong to him, had sold; but the value of which he was *now* obliged to refund to this Mrs. *Alic*. And she adds, that sometime *after this again*, her sister Mrs. Saph told her, that Mr. Harcourt had taken back the three notes, amounting together to 150*l.* odd; and had given her one note for 450*l.*, which note she then produced, and shewed to the witness.

The account furnished by the witness John Saph, relative, as it should appear, to this same note of hand for 450*l.*, is as follows:—In answer to an interrogatory suggesting him to have said, that “even if the *will* would not stand, still that his mother had the deceased’s note of hand for a considerable sum,” this witness, after, in the first place, denying the use of that, or any similar expression, goes on to state, that “the only note of hand he ever knew of, as given by the deceased to his mother, the producent, is one for 450*l.*, which was given, as the deceased told the respondent, for what he owed to the producent, and for a sum of money lent to him by the respondent’s sister, Ann Saph, who was just come of age, to enable him to pay the relations of his deceased wife some money, which the deceased

had, inadvertently, and conceiving it to be his own, applied to his own use." He says, that "he, at the desire of the deceased, *drew* such note, which was to secure both his mother and his sister, as he now best recollects, in the latter part of 1818; that he has seen it once since, in his mother's possession; but whether before or since the deceased's death, he cannot recollect." He further answers, that "if the same is now in existence, he does *not* know in whose care, custody, power, or control, it is."

Now it appears from the above, and by the names "Alie" and "Heyley" (which are nearly *idem sonantia*, especially vulgarly pronounced), that the transaction to which these witnesses would, some how or other, refer this matter of the "notes of hand," is the identical transaction deposed to by Mr. Fletcher Wilmot, in speaking of the deceased having altered his will of June, 1818, by that of October in the same year, as already stated, in consequence of his displeasure at the conduct of a Mrs. "Heyley," a legatee in the former will, in making some claims upon him as under the will of his deceased wife. But *he* deposes to the deceased's having borrowed money of Mr. Atkinson, and not of these Saphs, to pay Mrs. Heyley's demand; and the transaction itself *plainly* belongs to the former year 1818, and not to the year 1819, where Mrs. Gilbert's evidence would place it. Not to dwell, however, upon these inconsistencies, this circumstance of the notes, altogether, is one of a very suspicious character. If the transaction itself were fair and genuine, how is it possible that it should not have been brought forward in some shape (for instance, in proof of the intimate connexion between the Saphs

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and the deceased, and of the obligations which they *mutually* conferred upon each other) during the long pending of this cause? Mrs. Gilbert's account of it, after an interval of forty-eight hours for "recollection," confessedly spent with the Saphs, by no means either clears up the character of the alleged transaction itself, in my judgment, or impresses me with a favorable opinion (and it is with this view alone that *my* attention has been directed to it) of the credit due to her testimony in other particulars.

But, lastly, supposing even this witness, Gilbert, entitled to *full* credit, still the *declarations* to which she has deposed would leave the case pretty much where they found it. They are of the same character as those spoken to by Bursey, and are open to the same remarks. At all events, they are by no means so forcible as those of a contrary tendency stated by Nash and Randall, witnesses wholly unimpeached; which are directly referential to the will of October, 1818, and are plainly inconsistent with the alleged subsequent will of June, 1819, propounded on Mrs. Saph's part.

Supposing, then, the case to have rested here, the Court would have felt itself bound to pronounce *against* the instrument propounded; looking, in the first place, to the improbability that it should be, and, secondly, to the insufficiency of the evidence tendered in proof *of* its being, the deceased's *will*. Before actually arriving, however, at this conclusion, it is proper that I should notice the evidence which has been introduced into this case, on the *direct* question of whether the signature is, or is not, in the *hand-writing* of the deceased.

Evidence of
hand-writing,
general doctrine with respect to—

Evidence as to hand-writing, in questions touching

the factum of any instrument, is (or may be) common to both parties. Affirmative, may be produced by the parties setting up the instrument; and negative, by those whose object it is to impeach it. The advantage to be derived from either is, in a great measure, dependant on circumstances. Where neither the character of the transaction, nor the credit of the witnesses, is materially affected; affirmative evidence upon this head is unnecessary; and negative is unavailing: the converse of both these, almost necessarily, follows, where the transaction is suspicious, and where the witnesses are discredited. Such evidence, indeed, either affirmative or negative, is commonly inconclusive, for obvious reasons; the former, from the exactness with which hand-writing may be imitated; the latter, from the dissimilarity which is often discoverable, in the hand-writing of the same person, under different circumstances. Still, however, it is *admissible* evidence in these, as in other Courts; although the assertion that *greater* weight is attached to it here, than in other Courts, is by no means correct. On the contrary, the rule, *here*, rather inclines to hold, that a *will* cannot be proved by mere evidence to the hand-writing of (without some concomitant circumstance, as the place of *finding*, or the like to connect it with) the party whose suggested will it is.

In the present case, however, evidence as to the deceased's hand-writing was not merely *admissible*; but *affirmative* was actually called for, from the parties, that is, who have propounded this instrument, from the circumstance of *negative* being tendered, by its opponents, in every capable shape. Nor were they unaware of this, as it should seem,

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admissible here,
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Courts; but no
greater weight
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from their having *pleaded* the affirmative ; although they have not ventured to produce a single witness to an opinion, that the signatures to the asserted will are of the deceased's hand-writing. The first circumstance, therefore, that strikes one on turning to this part of the case, is, that the evidence is all upon one side ; on that side, too, in favour of which, in the view just taken by the Court, the scale, independent of it, decidedly preponderates.

I have said, and repeat, that negative evidence of this kind was vouched by the parties opposing this instrument, in every capable shape. For it was, in substance, pleaded by them, not only 1st, that the subscriptions to this instrument were not those of the deceased in the cause, and were known not to be such by persons who had seen him write, and were acquainted with his manner and character of hand-writing ; but it was further pleaded, 2dly, that the said signatures would *appear* not to be those of the deceased, on a comparison of them with other, his admitted, signatures ; 3dly, that they would appear to be of the proper hand-writing of Mr. John Saph ; 4thly, that they would appear to be, let who would write them, written in a feigned, and not in a natural, hand.

Now, as to the first of these four special allegations, no witness has been produced who will undertake to *swear, from a previous knowledge of the deceased's hand-writing, derived from having seen him write*, that the subscriptions to the instrument in question, are *not* those of Mr. Harcourt, the party deceased in the cause. Mr. Wilmot ventures nearest, but does not go the whole length, possibly, as much, from his disinclination—a disinclination which is common to most of us—to depose positively to such

a fact, as from any great *doubt* which he entertains upon the subject. But I am yet to learn, that this absence of evidence upon the first of the four, is a bar, as asserted, to the reception of any, upon the other three. The assertion has proceeded from an utter misconception, as I take it, of the true meaning of the maxim, that "the best evidence must be given, of which the nature of the thing is capable." But the application, at all, of that rule (into the *true* meaning of which *this* is not the right place to inquire) to the present case, assumes this position, namely, that "the evidence of witnesses acquainted with the supposed writer, and who have acquired a previous knowledge of his hand-writing from seeing him write, is the best proof of hand-writing—a position to which, if laid down universally, and without limitation, I am not disposed to accede. It may, or may not, be the *best*, according to the means, and extent of the witness's information, who deposes, one way or the other, from such previous knowledge; may be the best,—that is, where these are ample; and may be very far from it, where these are scanty, or abridged. Suppose the case of two persons who have written, for years, at the same desk; the evidence of one of these to the other's hand-writing, from his previous knowledge of it so derived, *may*, for aught that I know, be the best evidence which the nature of the thing admits. But suppose the case of two persons, one of whom has seen the other write only a few words, or only once, or many years ago—will it be said that the evidence of that one, to the hand-writing of the other, from *his* previous knowledge of it, so derived (which, still, be it observed, is that of a witness deposing to

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the party's hand-writing from a previous knowledge of it, acquired by having seen him write) is the best evidence? is better (for instance) than persons of competent skill and experience could furnish, after comparing the signature (for instance) in dispute, with ten, or twenty, admitted signatures of the same party, made, about the same time, and under not dissimilar circumstances? The proposition can hardly, I think, be seriously maintained. All evidence as to the hand-writing of any party is the mere statement of an opinion formed by the witness, on comparing a writing said to be his, with *some* standard; and to say that the mere having seen that party write, furnishes, under all circumstances, and universally, the *best* standard, would, in my judgment be absurd. I not only conceive, therefore, that the maxim of law which has been invoked into this part of the case, has been misunderstood, in the attempted application of it; but I deny the universality, at least, of the position which has been assumed, in the first instance, in order to its being invoked into the case at all.

Evidence, therefore, upon these last three heads, being clearly admissible, notwithstanding the absence, or failure, of evidence upon the first, is any *other* valid reason assignable for its exclusion? I am aware of none. Evidence of this description has always been received in these Courts (*a*). In the cases of *Revett v. Braham* (*b*), and *The King v. Cator*, and others (*c*), it has, also, been admitted in other Courts; and although under the special cir-

(a) See *Beaumont v. Perkins*, 1 Phillimore, 78.

(b) 4 T. R. 497.

(c) 4 Espinasse, N. P. C. 117.

a late case, that of *Gurney v. Long-*  
Court of King's Bench did *refuse* a  
an applied for on the ground that the  
visi Prius in that case had *rejected* such  
I cannot deem that refusal decisive against  
neral admissibility, at least in these Courts.

Such evidence being, then, upon the whole, ad-  
missible in this case, it remains only to see to what it  
actually amounts.

It is impossible that evidence of this sort can be  
stronger, or amount to more. The witnesses who  
have been examined, in proof of these special aver-  
ments, have given it as their opinion, *quasi uno ore*,  
1st, that the subscriptions to the will propounded,  
are not of the hand-writing of the deceased; a num-  
ber of whose genuine signatures were submitted to  
them, at the time of their examination, for the pur-  
pose of being compared with those in dispute; 2dly,  
that they are written in a feigned, and not in a  
natural hand; 3dly, that they are of the proper  
hand-writing of Mr. John Saph.

The persons who speak to these several par-  
ticulars (b), are persons of skill, persons whose pro-  
fession, I may almost say that it is, to examine  
hand-writing, critically, in order to the detection of  
forgery. In cases where witnesses of this descrip-  
tion entertain different opinions, they may so neu-  
tralize each other, that their evidence, as taken alto-

(a) 5 Barnewall & Alderson, 130.

(b) The witnesses examined upon these allegations were  
Joseph Hume, Esq. Inspector of Franks at the General Post  
Office; Mr. John Richard Taylor, Inspector of Franks at the  
General Post Office; and Mr. William Henry Nelson, a clerk  
in the Power of Attorney Office at the Bank of England.

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Term.  
SAPH.  
P.  
ATKINSON  
and  
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Trinity  
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and  
WHITCOTT.

gether, is good for nothing. But that is not the case here. These witnesses all give their opinion as to each of these several particulars; some indeed with greater, and some with less confidence, but they all give it one way. As to one particular, namely, as to these signatures being in a feigned, and not in a natural hand, they all speak, without the slightest hesitation, and with the *fullest* confidence. They say that, acting with all caution, where they entertain any doubts, they either state those doubts, or decline giving an opinion, altogether. *Here*, as to *this* particular, they neither state any doubts, nor are backward in drawing their conclusions—conclusions in which, in substance, they all agree.

There certainly is a very considerable likeness, to a common observer, between the deceased's alleged signatures to the will propounded, and his admitted signature to the prior will of October, 1818; *from* which last, by the way, the first of the two, if *not* those of the deceased himself, most probably were copied. At the same time there is one feature of dissimilarity, which, as it is noticed by *all* the witnesses, the Court will briefly advert to—I mean, the dissimilitude between the final “t’s” in the deceased’s name of “Harcourt,” in the genuine and disputed subscriptions. In every admitted signature, the “t” is made *without* carrying the pen back behind the perpendicular line, and then crossing it. In every disputed one, it is made *by* carrying back the pen behind the down stroke, and then crossing it, with a loop. This, in itself, is a strong circumstance, *of the kind*, and will appear more so, when I add, that in every admitted signature, of which there are several, of the deceased’s name *by* Mr. John

*Saph*, the final "t" in *Harcourt* is made in the same way in which it is, in the disputed signatures to the alleged will.

Upon the whole, I am bound to pronounce that the party setting up this will, has failed to establish its authenticity; and I think that I am also bound, as well in justice to the other party, as by way of general example, under all the circumstances of this case, to condemn her in the costs of the present suit.

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TROWER and SMEDLEY v. COX.

1822.  
Trinity  
Term.

**T**HIS was a cause or business of citing Frances Charlotte Cox, wife of Robert Albion Cox, to bring into, and leave in, the registry of this Court, letters of administration (with the last will and testament annexed, bearing date the 5th day of February, 1794) of the goods of Francis Newman, deceased, thenceforth committed and granted to her, as the natural and lawful daughter of the said deceased; and to shew cause why the same should not be revoked, and declared null and void, as unduly obtained; and why letters of administration (with the last will and testament annexed, bearing date the 26th day of September, 1817, with two codicils annexed) of the goods of the said deceased, should not be committed and granted to Robert Trower and Francis Smedley, as the lawful attorneys of Elizabeth Hannah Friers, otherwise Elizabeth Newman, the sole executrix, and

2d Session.

The attorneys of an executrix having withdrawn from the suit, after propounding an alleged will, and suffered a next of kin to take administration, held, under the circumstances, not to bar that executrix, from calling upon the next of kin to bring in the administration, and repropounding the alleged will.

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residuary legatee during her single life, named in the said will.

An appearance was given for the party cited, under protest; and an act on petition was entered into.

In this act it was (in substance) alleged for the party cited, *that* "Francis Newman died in the month of March, 1818, having first made and executed his last will, bearing date 5th February, 1794; and thereof appointed certain executors, all of whom, with the exception of James Meddowcroft, died in the testator's life-time; and having, in and by his said will, given and bequeathed the residue of his estate and effects to his reputed son, Elizabeth Francis George Newman, who also died in the testator's life-time; whereby such bequest of the residue became lapsed:—*that* in the month of February, 1820, a citation issued under seal of this Court, at the instance of Frances Charlotte Cox, the natural and lawful daughter of the deceased, against James Meddowcroft, the surviving executor, to bring in, and take probate of, the said will; otherwise, to shew cause why administration, with the said will annexed, should not be committed and granted to the party proceeding:—*that* the executor appeared to that decree, and brought in the will, but declined taking probate; whereupon, the usual steps were had, and letters of administration, with the said will annexed, were *about* to be decreed to the said Frances Charlotte Cox, to wit, on the 3d of May, 1820, when a proctor intervened for Robert Trower and Francis Smedley, as attornies of Elizabeth Hannah Friers, otherwise Newman, alleging her to be sole executrix of the last will and testament of



the said Francis Newman, bearing date the 26th of September, 1817, with two codicils:—*that*, upon this intervention, the cause assumed a regular shape, and was proceeded in by the said attornies on behalf of their principal, up to giving in an allegation propounding the said last will and codicils; when, on the caveat day after Trinity Term, to wit, on the 5th of September, 1820, the proctor for the said attornies declared that *he proceeded no further in the said cause*—upon which letters of administration with the will of February, 1794, annexed, were decreed to the said Frances Charlotte Cox, and passed the seal, accordingly, on the 12th day of the said month.” And it was submitted for the party cited, “*that* the said Robert Trower, and Francis Smedley, under the circumstances above set forth, were not entitled *again* to set up the said pretended will of the said Francis Newman, bearing date the 26th day of September, 1817, as his true last will and testament; and, consequently, *that* she was not bound to appear, absolutely, to the citation taken out in the cause.”

To this it was replied, on the behalf of the parties proceeding, *that* “Robert Trower and Francis Smedley (the said parties) who had been previously concerned as solicitors for Francis Newman, the party deceased in the cause, having received from America an official copy of the last will of the deceased, bearing date the 26th of September, 1817, and the said codicils bearing date on the 30th of September, in the said year, on or about the 28th day of December, 1818, they gave intimation thereof to Robert Albion Cox, the husband of the said Frances Charlotte Cox, the

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# JUDGMENT.

Sir JOHN NICHOLL.

Frances Charlotte Cox (heretofore Newman) the party cited in this cause, is the natural and lawful daughter of Francis Newman, deceased; and, as such, is administratrix of the deceased, with a will annexed, dated in February, 1794, and executed in this country. The deceased afterwards went to America, where he died in March, 1818, leaving there a wife, or rather a female with whom he had cohabited as a wife; and a numerous family, consisting of four sons and three daughters.

In the month of February, 1820, a citation issued under seal of this Court, against Mr. Meddowcroft, the sole surviving executor of the will of February, 1794, at the instance of Frances Charlotte Cox, asserting herself to be interested in the lapsed residue of the deceased's estate given by that will to his *reputed* son, whom she alleged to have died in the testator's life-time. The sole object of that proceeding was, that the party instituting it might obtain letters of administration of the deceased's effects, *with the will of 1794 annexed*, in the event of the executor declining to take probate; and it had no reference whatever, *ostensibly at least*, in its origin, to any *subsequent* will of the deceased. In the course of that proceeding, however, Messrs. Trower and Smedley, (parties in the present suit) intervened, as attornies for Elizabeth Hannah Friers, otherwise Newman, asserting her to be the sole executrix of a *subsequent* will of the deceased, dated in September, 1817, and praying letters of administration with this *subsequent* will annexed, to be granted to them in her behalf. After pro-

pounding this latter will, however, and giving an allegation, they withdrew from the suit in which they had so intervened, declaring they "*proceeded no further*;" upon which, letters of administration, with the will of 1794 annexed, were decreed to Mrs. Cox *without* opposition, in common form. The question is, whether the executrix is so barred by her attornies having withdrawn from the former proceeding in the manner which I have described, as *not* to be entitled to call upon Mrs. Cox, to the effect of the present decree.

Now, under the circumstances stated in this act on petition, on the one side, and on the other, I am not disposed to hold, that the party proceeding *is* so barred, or that the party cited *is* exonerated from the obligation of an absolute appearance. The suit here, in 1820, was commenced against the executor of the prior will, and not against the executrix of the alleged subsequent one; nor involved any call upon her to set up the validity of that instrument. It is true, indeed, that she intervened in the suit, and propounded that instrument for herself, by her attornies; and that letters of administration, with the one will annexed, were decreed to Mrs. Cox, only upon *their* declining to proceed to proof, in solemn form of law, of the other. But it must be remembered, at the same time, that there has still been no sentence, either for, or against, the *validity* of either will; and, although, in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, *will* hold them bound; yet, it would be unjust, and inequitable, not to make great allowance in this

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Term.

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respect for a case, circumstanced as the present is, for a variety of reasons. For here, in the first place, the party principal is abroad—is resident in a foreign, and distant, country—a circumstance, which, *alone*, would induce the Court to distinguish this from an ordinary case. But, secondly, and principally, on what grounds did Messrs. Trower and Smedley proceed in withdrawing from the former suit? Was it under any special authority to that effect, communicated to them (under any misapprehension even) by their principal? No such thing. It proceeded, as they allege and depose, upon quite different grounds. Upon the insufficiency of their funds—upon their unwillingness to act under their power of attorney (now rectified in that respect) but which, it seems, then contained some obnoxious clauses—and, lastly, upon the “repeated and solemn” assurances of Mr. Cox, the husband of the party proceeding, (somewhat too hastily, perhaps, confided in, on their parts), that “he could prove the will and codicils” of which their principal asserted herself the executrix, “to be a forgery.” Now the attornies declining to act, or being deterred from proceeding, under these circumstances, is *not* so binding, in my judgment, upon their principal, as at all to exclude, even *her*, from re-propounding the alleged last will under the process now taken out.

But the question, in substance and effect, which the Court has to determine, goes a great deal further, being, not whether the act of the attornies shall be binding, to this extent, upon their principal, merely, but, also, whether it shall be binding, and to a similar extent, upon all the parties interested in the bequests of this will. For, unless the Court should

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determine to have *this* effect, as well as the former; it would be of little avail to relieve Mrs. Cox from the obligation of appearing to this decree. But that it has, or can have, the effect of barring the *other* parties entitled under it from putting in suit the validity of the will—several of the parties so entitled, and, among them, the substituted universal legatee, being minors; all of them being resident abroad; and none of them having been cited, in the course of the prior proceeding, either in form, or in fact—is, I apprehend, a proposition that can hardly be, seriously, contended for. The asserted will of 1817, has every appearance of authenticity, as far as I can judge by inspection of the mere copy; it is certified by the register of Maryland; it was proved, recently after the death of the deceased, not merely on the oath of the executrix, but on the oaths (which it is the custom to require *there*, for the purpose of the probate) of the subscribed witnesses; there are two codicils of a subsequent date to that of the will; and the instrument has every internal evidence of genuineness, which can be furnished by the *character* of the dispositions contained in it. Still, however, it may be a forgery, as Mr. Cox suggests. I would be understood only to mean that it looks authentic, *prima facie*. Now that the Court should set aside all this; and should decree this whole property (taken, originally, as under 100*l.*; but which, it seems, may eventually be 8000*l.* (a)) to Mrs. Cox,

(a) It was said, in explanation, that the amount of the effects was dependant upon the issue of a suit in Chancery; and that if it turned out to be greater than the sum administered to, it was the intention of the administratrix to amend the administration in that respect, as directed by the stamp act.

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away from the *legatees*, merely because the *attornies of the executrix*, under special circumstances, withdrew from the former suit, would be a departure from all those principles upon which this Court is in the habit of proceeding, in determining these, and similar cases.

But, superadded to this, there is a circumstance disclosed in the act, which gives double weight and effect to the considerations on which I have previously insisted, and which does not leave, in my mind, a shadow of doubt, as to the propriety of directing an absolute appearance. The residuary legatee in the deceased's will of February, 1794, was a reputed son, described in the will as "Elizabeth Francis George Newman;" and it was solely upon *her* allegation of his death in the testator's life-time, that letters of administration were granted to Mrs. Cox at all; she taking no benefit whatever under the will, but in that event. It is *now* alleged, however, that this reputed son, not only survived the deceased, but is still living; and is a legatee under the will about to be propounded, under the description of "Francis Newman" only. Why, if this be so, Mrs. Cox's administration is clearly voidable; and she, while in possession of it, is a mere trustee for the benefit of the residuary legatee under the former will; independant of any consideration of the validity of the alleged latter testament. It is true that the fact of this reputed son having survived the father, rests in allegation only; but it is to be remembered that so also does that other fact, of his death in the father's life-time. For I take Mrs. Cox's affidavit, which states that event only in general terms, and without any specification of time

or place, as proof only of her information, and, of course, of her belief, of that event, and not as proof, strictly speaking, of that event itself.

Upon the whole, though Mrs. Cox is entitled to be reimbursed for any expence to which she may have been put in taking out these letters of administration; yet, I am clearly of opinion, that the executrix, and the parties benefitted under the alleged latter will, are not barred by any thing that has hitherto occurred, from putting it in suit; and, consequently, I over-rule this protest, and direct an absolute appearance.

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Term.

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### EVANS v. KNIGHT and MOORE.

#### JUDGMENT.

Sir JOHN NICHOLL.

The party deceased in this cause is John Moore, who died on the 24th April, 1812. He had formerly been in service, as a gentleman's coachman; but afterwards took a wine and liquor shop at the corner of Goodge Street, in Tottenham Court Road, where he died.

The deceased, while in service, had two natural children, by different mothers; the one, a daughter, Betty White, of whom I shall have occasion to speak presently; the other, a son, John Moore, who was in the naval service, and whose death has occurred subsequent to that of the deceased in this cause. He does not appear to have cohabited with either of these women.

1822.  
Trinity  
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3d Session.

Probate in common form of certain "instructions" as containing the last will of the deceased, granted, on a special affidavit—That probate called in, eight years after, and the executors put on proof of the will in solemn form of law. This step held to have been taken by the next of kin upon insufficient grounds—the instructions pronounced for—and the next of kin condemned in costs from the

time of giving in their allegation.

1812.

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and  
MOORE.

In 1808, the deceased paid his addresses to a young woman named Mary Hewitt, then living with her parents, in Oxfordshire; and shortly after he came to London, wrote to Hewitt to come up, as for the purpose of being married to him. With this request she complied; and they were supposed to have been married, accordingly. Whether a marriage in fact, however, and still more, whether a *legal* marriage was had between the parties, is extremely doubtful; at all events, no legal marriage can be proved; and the presumption is strongly, that none such was had. But from that period to the death of the deceased, they cohabited as man and wife; acknowledged each other as such; and were universally so reputed. The issue of this connexion were three children, of whom two, a son and a daughter, survived the deceased, and, indeed, are still living. The deceased invariably treated them with the greatest love and affection; and constantly acknowledged them as his *lawful* issue.

The deceased, who, by the assistance of his reputed wife, appears to have been successful in business, purchased, in the year 1807, a house in Tottenham Court Road, held on lease for a term of which more than ninety years were then unexpired; and which is stated in the answers to be let for 165*l.* per annum. In 1809, he purchased a piece of ground in Alfred Place, on a similar lease, and built a house, No. 30, stated also, in the answers, to be let for 63*l.* per annum. In 1811, he purchased ground in Upper Gower Street, upon which he was building two houses at the time of his death: they have since been completed, and are proved to let, as above, at 195*l.* 12*s.* per annum. It is in evidence



from the witnesses on *both* sides, that the deceased made frequent declarations of the manner in which he meant to dispose of these houses. He frequently declared his intention to give the house in Tottenham Court Road to his widow; the house in Alfred Place to his daughter Jane; and the houses in Upper Gower Street, to his son Richard, an infant of two years old at the time of his father's decease.

About a fortnight before the deceased's death, he caught a violent cold, while standing about in the wet to purchase timber for his new buildings. This produced an inflammatory affection of the chest and lungs, technically called "peripneumony," under which the deceased was evidently labouring for several days before his death; and which terminated his life, on *Friday*, the 24th of April. No apprehension whatever of the result appears to have been entertained until the *Monday* preceding, when a physician, Dr. Outram, was called in for the first time; rather, it should seem, to satisfy some doubts entertained by Mrs. Moore (or Hewitt), as to whether the deceased were getting better, than from any thing in the nature of actual alarm that he was getting rapidly worse. It is *alleged* that the deceased, on that day, sent for a professional gentleman, to make his will, who attended, accordingly, but not till the afternoon of the following day, being *Tuesday*, the 21st of April; when, it is also alleged that, he took from the deceased *instructions for his will*. The purport of these instructions is to dispose of the leasehold houses in the manner which I have already stated, in stating the deceased's declared intentions with respect to the disposal of them. They further provide, that the expence of finishing the

1822.  
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*Term.*  
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 EVANS
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 and
 MOORE.

houses in Gower Street shall be defrayed from the deceased's personalty; the residue of which shall "be for the use and benefit of his children;" and they appoint the deceased's "wife, Mary Moore" (so termed in the instructions), his brother, Richard Moore, and a friend, Mr. Joseph Knight, his executors. From these instructions, which are alleged to have been signed by the deceased (who also inserted the date), and attested by the solicitor, a will was actually drawn up, which the deceased, however, was prevented by death from executing.

Probate of the instructions so taken, *as containing the last will of the deceased*, was granted in common form, upon a special affidavit of the solicitor, and of Mr. Hewitt who was present at the giving of the instructions, to the subscription and date being in the hand-writing of the deceased; and to the several circumstances in support of them, of which the above may be considered a general outline. It was granted to all three executors; and the deceased's property, sworn not to amount in value to 10,000*l.*, was administered under that probate, for eight years. But in the year 1820, that probate is called in, upon a suggestion that the deceased was incapable, from delirium, at the time when the instructions, as pretended, were taken, of which it was had; and the executors are then, for the first time, put on proof of the will in solemn form of law.

This is the history of the case; and, under the circumstances stated, the presumption is strongly in favour of the will. The burthen of proving incapacity rests with the parties setting it up; especially at this distance of time. It is said, indeed, that these parties had no interest in the question of the

deceased's testacy, or intestacy, until their discovery (stated to have been made for the first time, it does not appear by what means, in the year 1820) of the nature of his connexion with Hewitt; being ignorant, till then, of the relation in which they stood to the deceased of his *legal* next of kin. This will justify them, I admit, for not proceeding *sooner*; if it shall appear, in the end, that they have sufficient grounds for proceeding *at all*. It is a circumstance, however, which disposes of one only of the numerous difficulties attending the case set up, as in opposition to the will. On the other hand, I observe that one of the next of kin, now impugning the instructions, is the very brother who took probate of them; and swore, consequently, to his belief of their containing the deceased's *will*. I must presume therefore that this brother had no intimation, *at that time*, that the deceased was incapable when the instructions were taken. Yet he says, in his answers, that "he saw the deceased two or three times every day, from the time of his being taken ill, till his death." It is also in evidence, that he had a daughter resident with the deceased through the whole period of his illness; a daughter, too, *now* deposing to the deceased's *incapacity*, pretty unreservedly. Under these circumstances, had the fact been such, how is this brother's ignorance of it at that time, which I *must* presume, to be, even *probably*, accounted for?

It should seem, indeed, as if the next of kin were fully apprized of these difficulties; for the suit has been conducted, on their part, with extraordinary activity. No pains have been spared to procure evidence *against* the will; every *legal* means, at least,

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has been resorted to, to exclude such as might tend to support it. The medical gentlemen who attended the deceased are *twice* had to the solicitor's chambers, and interrogated as to their opinion of his capacity; and this eight years after his death. Dr. Outram is apprized by one of the relatives, whom he was professionally attending, *a twelvemonth before his examination*, what was contemplated, in consequence of their discovering that the deceased was not married to Hewitt—namely, “the setting aside the deceased's will, which, *they said*, had been made while the deceased was delirious.” This sort of, all but, tampering with witnesses, frequently communicates a bias; and renders the Court a little jealous as to mere matters of opinion, deposed to from recollection, especially after a long interval, by witnesses, however respectable, upon whom it has been practised. Again, if the witness Smith is to be believed, applications were made in another quarter, of a still less warrantable description. He deposes to having been present with Edward Manwaring, when a Mr. Barker, the solicitor for the next of kin, “was extremely urgent with him, the said Edward Manwaring, to call upon him, and told him, in deponent's presence and hearing, that he was sorry the *other* party had got him first—that Mr. Roberts could not find out his direction—that if *they* could have got him first, they would have managed to keep him out of the way at all events, and so to have weakened their opponent's case. Mr. Barker then asked Manwaring if the signature to the will was of the deceased's hand-writing; to which Manwaring replied that it was; and that no power on earth should induce him to say otherwise. And he

said further, that Roberts knew it as well as he, Manwaring, did. Subsequent to this, several letters came from Mr. Barker to induce Manwaring to go to him; and Manwaring begged that he might be refused, if Mr. Barker should call; and he requested of the deponent to go to Mr. Barker, and tell him, that he, Manwaring, would *not* come to him." In justice to the professional gentleman employed for the next of kin, the Court abstains from giving *full* credence to this account; as the matter of the charge coming out upon interrogatories to Smith, a witness, upon the allegation given in support of the character of Manwaring, no opportunity has been afforded him of explaining or denying it. Lastly, four of the seven witnesses produced to the testator's incapacity are on the very verge of incompetency, as being the children of parties entitled in distribution; and, consequently, as having a derivative interest in setting aside the will. As to the *exclusion of evidence* tendered by the *other* party, witness the double attack on Manwaring (*a*), on his general character and his particular evidence; arising too out of transactions very remote in point of date, and quite unconnected with the subject of the suit. Witness, too, the objection to the competency of Hannah Roberts (*b*), on the score of an interest in

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(a) Vide page 138, ante.

(b) Hannah Roberts, wife of John Roberts, was produced and examined on the part of the executors. Subsequent to her evidence being taken, an allegation was given for the next of kin, pleading, "that the paper-writing propounded, purported to contain amongst other things a bequest in the following words:—
"I give unto my dear wife, Mary Moore, my house, No. 19, Tottenham Court Road, in the county of Middlesex, for the re-

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the event of the suit, acquired long subsequent to the death of the testator; so that her evidence in favour of the will, now (in a manner) rejected by the Court, would have been unexceptionable, had the question of its validity been gone into, *recenti facto*. Witness, again, the objections urged to the affidavit of Mr. Moore, the solicitor who prepared the will, being introduced into the cause (a). All which I would be understood to signify by these observations, is, that if parties choose to contest

mainder of the term therein:—*that* after the death of the deceased (to wit) in August, 1818, Mary Moore (or Hewitt, so calling herself) by virtue of a certain indenture, or deed of gift, assigned or set over the said house and premises, No. 219, Tottenham Court Road, for the remainder of the term then to come and unexpired therein, and all her right, title, and interest therein, *under and by virtue of the said bequest*, to certain persons, in trust for her use and benefit, during the term of her natural life; and from and after her decease for the use and benefit of her children, as therein mentioned: and from and after the respective deaths of her children, then to and for the absolute use and benefit of Hannah Roberts (formerly Hewitt, she being Mrs. Moore's (or Hewitt's) sister) or her assigns." Consequently that she, the said Hannah Roberts, had, at the time of her examination, a contingent interest in the said house and premises; by reason of which she was an incompetent witness, as having an interest in the event of the cause.

This allegation was admitted, without opposition on the part of the executors. Upon the evidence, however, there was no proof whatever that the witness had any knowledge of the deed pleaded against her, *at the time of her examination*; on the contrary, there was every reason to believe that she was *then* wholly ignorant of it. But the proofs of this last not being quite satisfactory, and the counsel for the executors not pressing for its reception, the evidence of Hannah Roberts, under the circumstances, was taken as rejected.

(a) Vide note (a), page 251, post.

wills, under such circumstances, and by such means, they must be content to do it at their own peril.

Such then is the general character of this proceeding; and the question for the Court's determination is, whether these pretended instructions were fraudulently obtained from the deceased while in a state of delirium and incapacity. I apprehend there is no medium: it is not resolvable into a case of erroneous impressions, as to the state of the deceased, on the part of those privy to, and connected with the transaction. The adverse case, indeed, set up is, that the transaction, throughout, was bottomed in fraud, and has been sustained by perjury. It even appears that suggestions have been thrown out of *forgery*, as if the date and signature to the will were *not*, as alleged, of the hand-writing of the deceased. This was suggested to Manwaring, as appears by the answers of Smith to the 3d interrogatory, in part recited above; and is also suggested in the *answers* of the parties to the allegation propounding the will. And the witness, Hewitt, deposes to having been shewn a letter from a nephew of the deceased to Mrs. Browne (formerly Moore, or Hewitt), in which he asserted "that the deceased's pretended will was a *forgery*; that she, Browne, and Hewitt, had *perjured* themselves; and that if they knew no better, he would teach them."

The circumstances of this case hardly require, perhaps, a preliminary statement—that where mental aberration is proved to have shewn itself in the alleged testator, the degree of evidence necessary to substantiate any testamentary act depends greatly on the character of the act itself. If it purports to give effect only to *probable* intentions, its validity

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may be established by comparatively slight evidence. But evidence, very different in kind, and much weightier in degree, is requisite to the support of an act, which purports to contain dispositions *contrary* to the testator's *probable* intentions, or savouring, in any degree, of folly or phrensy.

What then are the features, and what is the character, of the testamentary act, set up in the present case? It is precisely such a disposition as natural affection would dictate. The testator bequeaths by it his whole property, in equitable proportions, to his wife and children. If, in truth, the mother of these children were not his lawful wife, this rather increases, than repels, the presumption in favour of the act. In addition to natural affection, it rendered some measure of the sort absolutely incumbent on the deceased, in point of moral duty; as his intestacy in that case would have left this mother and her children wholly destitute, and unprovided for. But the conformity of these bequests with the deceased's *probable* intentions does not rest upon their accordancy with natural affection, and moral duty, *merely*; they are conformable with the deceased's constant and repeated declarations, spoken to by *both* sets of witnesses, as to the disposition of the major part of his property, that consisting of the leasehold houses. There is no evidence, indeed, of any precise declarations of the deceased as to his intentions with respect to the residue; but to whom was it probable that this should be bequeathed but to his children?

Now the presumptions in favour of a will of this description are strong, and it is capable of being supported, according to what I have already observed, on comparatively slight evidence. What the

evidence tendered in support of this instrument actually is, shall be considered presently. I shall first, however, proceed to state and examine the proofs adduced of the testator's alleged *general* incapacity, at and about the time when the instructions were taken.

Experience in this Court teaches us, that evidence upon questions of capacity is almost always contradictory. The obvious grounds of conflicting evidence upon these questions are, *that* evidence of capacity is, commonly, evidence of opinion merely; *that* of the witnesses, no two, possibly, have seen the party whose state is deposed to, at precisely the same time, and under precisely the same circumstances; and *that* each again of the several witnesses, however numerous, measures, possibly, testamentary capacity by his own particular standard. These sources of discrepancy, and many more might be enumerated, are common to *all* cases of this description. In the present case, however, there is an additional source, namely, the remoteness of the transaction to which the witnesses are called to depose—a circumstance sufficient, in itself, to account for a no inconsiderable degree of contrariety of evidence, even where the witnesses have to speak to *facts* merely, and not to opinions formed, and inferences built, upon facts, of which most of the evidence commonly furnished on questions of capacity, as already observed, is made up. If the Court therefore, on questions of capacity, generally, is accustomed to rely but little on such evidence, so far as it is that of *mere* opinion; but to form its own judgment from the *facts*, and the *conduct* of the parties *at the time*; it becomes it to do so, more peculiarly, in the present instance, where much of the evidence

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not merely consists of opinions, but of opinions, delivered long subsequently to the transactions which they profess to have suggested them—upon loose recollections, too, and, in some instances, after repeated discussions of the subject-matter with interested parties.

The witnesses examined in support of the deceased's incapacity on the day when the instructions were taken are three nieces, and a nephew of the deceased—Betty White, his natural daughter—and Doctors Outram and Pearson. Of these, the deposition of White, the fifth witness, must be taken with some abatement of the credit which might otherwise be due to it; she having died before she had been repeated, or examined upon the interrogatories of the adverse parties (a).

(a) Betty White, the deceased's natural daughter, was produced and examined, in chief, on the allegation given in behalf of the next of kin. The examiner reduced her deposition into writing, and afterwards read the same over to her, and she declared the same to be true; *but did not sign it*. The examiner, being unable to proceed at that time, desired her to attend on a subsequent day. Previous to this, however, the witness was seized with a sudden and violent illness, which occasioned her death in two or three days, before her deposition was signed, and before she had been repeated, or examined on the interrogatories of the adverse party. These facts were pleaded in an allegation offered for the purpose of inducing the Court to receive her deposition so, in part, taken; and being proved by the depositions of five witnesses (one of whom was the examiner) it was received accordingly, with some deductions, however, from the credit due to it, as stated in the text, proceeding on the supposition that the cross-examination *might have* discredited the witness. See *Hill v. Bulkeley*, 1 Phillimore, 280. The deposition of the witness in that case was one step nearer completion; as being actually signed; the single material point in which it differed from the deposition of White, in the present case.

Now of these nieces and the nephew, and White, the natural daughter, it is extremely difficult to reconcile the evidence, even taking into the account *all* the grounds of discrepancy which I have just stated. Some of them say that the deceased was so violent as to be obliged to be held; others represent him as tranquil and quiescent, which last is the character ascribed to his disorder by Dr. Pearson. Some fix the commencement of his delirium on the Monday or earlier; one, indeed, as early as a fortnight before his death; others observed no symptoms of wandering till the Tuesday, and then only slight ones. All agree, however, that the deceased's delirium was not continuous but intermittent; that he was not, at once, plunged into a state of derangement from which he never recovered, but that this was slight at first, and grew worse latterly, *pari passu* with the disorder that produced it. And this, I apprehend, is the natural course of the thing where delirium is not the primary disorder—where the seat of *that* is the chest or stomach, and the head is only affected collaterally.

In estimating, however, the general result of this evidence, the utmost length which the Court could go would be to hold, that some degree of wandering had began, occasionally, to shew itself in the deceased, as early as the night of the 20th; or the morning of the 21st. But this evidence, even as fortified by that of Dr. Outram and Dr. Pearson, by no means *excludes* proof of capacity; or renders it, in the slightest degree, improbable, that the deceased should have been in the *perfect* possession of his intellects, for a sufficient interval to perform the testamentary act now under discussion. Dr. Outram only

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speaks to "restlessness and excitement" on the 21st, and an "evident aberration of mind:" he expressly deposes that the deceased was *not* in a state of total derangement;" and that, in spite of "a marked confusion of intellect," he could answer questions put him, sensibly and rationally. Is there any thing in all this, I may ask, which negatives the probability that the deceased might not merely answer questions sensibly and rationally, but possess full testamentary capacity for the period which this transaction would occupy? The length of time during which a patient in this state *continues* rational, when roused from torpor or delirium, commonly depends on the degree of excitement, and the degree of interest, by which he is roused: and the same patient who instantly relapses, after answering, *rationally*, the common-place queries of a servant or medical attendant, into wandering or delusion, may be stimulated, by any matter of great interest, into the active exertion, of a much greater portion of intellect, for a much greater length of time.

Upon the evidence of these witnesses I shall only further observe, that there are certain admitted facts in the case which are hardly consistent, with what *must have been* the opinion of those about him *at the time*, if the deceased's state and condition on the 20th and 21st had really been such as *they, now*, describe it. Dr. Outram is not called in till the 20th; and then, as it should seem, from no great alarm entertained on their parts. The witness, John Roberts, deposes, "*that* the deceased was ill about a fortnight before his death, as he the deponent best recollects: he was for some time attended by Mr. Thomas, a surgeon, who said he was getting better; but the said Mary Hewitt,

who lived with the deceased as his wife, *thinking Mr. Thomas not altogether right about it*, sent the deponent to make some inquiries, &c.;" which, in short, terminated in the introduction of Dr. Outram. The deponent "was not present when Dr. Outram saw the deceased: he was then in a small parlour behind the bar." Hewitt deposes to having gone, on the morning of that day, to Camden Town, "to take a lodging for the deceased to be removed to; but when he returned, after engaging a room, Dr. Outram, whose first visit had been paid in this interval, said, that he could not be removed *before Friday*, when he would determine about it." It is not till *Thursday night*, I observe, that Dr. Pearson is called in to consultation; and this, and the merely *postponing* the deceased's removal, satisfies my mind that Dr. Outram did not, *at the time*, think him in that imminent danger on the 20th, which he *now* conceives himself to have thought him in, at his first visit. Dr. Outram expressly deposes, that "*the persons about the deceased* had very erroneous notions upon the subject, having no adequate idea, if any apprehension at all, of the danger he was in." This could hardly have been, had the deceased's state, at that time, been such as the witnesses upon the part of the next of kin would now represent it. Dr. Pearson did not see the deceased till the evening of the 23d, when he was *in extremis*, having actually died on the 24th. His evidence proves no *fact*; and his state and condition on the evening of the 23d, the day preceding his decease, furnishes, to my apprehension, very imperfect grounds for an *opinion* even, of what it was, especially in point of mental capacity, in the afternoon of the 21st.

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To the evidence of these witnesses, with the exception of Doctors Pearson and Outram, as to the deceased's capacity, so far as it goes to mere *opinion*, the Court is disposed, for reasons already stated, to pay but little respect. But the mere opinions of professional men of eminence, can, by no means, be passed over with similar inattention.

Now Dr. Outram certainly deposes, that "when he saw the deceased on the 21st day of April, the deceased was *not*, in his, the deponent's, opinion, in a state of sound mind, memory, and understanding, or capable of doing any act requiring the exercise of thought, judgment, and reflection." The length of Dr. Outram's visit on that day, I should observe, did not exceed "a quarter of an hour, or twenty minutes;" and whether his incapacity during, and through, the *whole* day, is a matter of fair inference from his incapacity, admitting him, for argument's sake, to have been incapable, during that small portion of it, may, under the circumstances, be justly doubted. Dr. Outram's opinion, however, is, *to some extent*, that of Dr. Pearson, who says, "that he cannot depose to the state of the deceased on the 21st day of April aforesaid; for the deponent did not see him at all on that day. But the deponent saith, that the deceased's complaint did not appear to be of that acute peripneumonic nature, which sometimes attacks persons in good health *suddenly*; but it appeared to be of that kind which had been preceded by inflammation: and it would be out of the ordinary course of that complaint, and so much so as to make it extremely improbable, that the deceased should have been free from wandering and mental affection on a day so shortly before the de-

ponent saw him, as the 21st day of that month, the deponent having seen him on the 23d. The deponent considers it to be highly improbable that the deceased should have been of sound mind on the 21st day of April aforesaid." To the opinions of these gentlemen, had they been examined *recenti facto*, the Court must have deferred very considerably, though opinions merely; but it is by no means disposed to place the same confidence in them, delivered eight years subsequent to the facts upon which they are founded. Dr. Outram, indeed, speaks from "*memoranda*" opposite the deceased's name in his "*book*;" but he does not tell us how these *memoranda* were made,—whether the symptoms of each day were noted upon that day, or whether the whole was put down together, as it might have been, after the deceased's death, in support, possibly, of his hypothesis (with which the Court does not presume to interfere), relative to the nature of his patient's disorder, which the result confirmed.

I am of opinion, therefore, that the *whole* of this evidence, I mean the evidence of these nieces and the nephew taken in conjunction with that of Doctors Pearson and Outram, not only does not exclude proof of testamentary capacity when these instructions were taken; but that it does not even oppose any thing in the shape of *antecedent incredibility* to the evidence of such capacity at that time, which may be furnished by the other party.

What then, on the other hand, are the direct proofs of *capacity* in the deceased, when these instructions were taken; and what are the inferences in support of those proofs, fairly deducible from the facts of the cause, and the conduct of the parties at the time?

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In the first place, then, it is admitted, that the person sent for to make the deceased's will (whether at the suggestion of Dr. Outram or not, is not very material) was Mr. Moore, a solicitor well acquainted with the deceased, and long employed by him in that capacity. It is admitted, too, that his services were invoked as for that *express* purpose; and without, as it appears, any shadow of clandestinity. How utterly inconsistent is this with the case now set up against these parties. Was this the probable conduct of parties meditating fraudulently to obtain a pretended will from an incapable testator? Hewitt or some other of those privy to the fraud would, in that case, have been the drawer of the will: and *this* gentleman, of whose character I shall presently speak, was the *last* person to be sent for upon such an occasion.

Lloyd, an old and very intimate, friend of the deceased, deposes, that "having called to see the deceased in the afternoon of the Tuesday next immediately preceding the day of his decease, he was desired to walk up stairs, which he did, into a small bed-chamber, where he believes the said deceased usually slept—that to the best of his present recollection there were two women in the room, one of whom was Mrs. Cutmore." He says, that "he inquired of the said deceased how he was, who, he thinks, replied '*not worse.*' That soon after, Mrs. Moore came up; and the deponent, whispering, asked her, if Mr. Moore had made his will? To which she replied *no*; and then added, '*but he is going to make it to day.*' Shortly after which she requested the deponent to assist the deceased into the next room, whereupon the deceased and the de-

ponent proceeded up a few stairs, the deponent putting his hand under one of the deceased's arms in going up stairs. Not long after, Mrs. Moore joined them, and Mr. Richard Hewitt came in. In a short time afterwards, a gentleman, at that time unknown to the deponent, but whom he understood before he left the house to be a Mr. James Moore (the solicitor), came into the room. After inquiring of the deceased how his health was, he said 'you want to make your will;' to which the deceased replied 'I do.' That pen, ink, and paper, were then procured, and a table placed for Mr. James Moore, when the deponent, considering that it was proper for him to withdraw, took his leave."

Why this evidence (especially coupled with the *res gesta*) outweighs all the loose evidence of delirium given by the adverse witnesses, and proves capacity equal to the act done, *up to the very instant of its being entered upon*. He speaks to the *perfect* capacity of the deceased, in *his* opinion; and adds, that the deceased was very weak and unwell, but, he believes, had no thought of dying. He also saw the deceased on the following day, the Wednesday, and speaks to his perfect capacity, in *his* opinion, at *that* time.

But the evidence of Hewitt is much more decisive, and, indeed, proves the whole case. Unless the Court imputes to this witness the grossest perjury, all doubt on the subject is removed. It is not from his opinion, but from the facts to which he speaks, that the Court is warranted in drawing this conclusion. It is true that he is the brother of Mrs. Moore (or Hewitt), and, as such, a biassed witness; but he has no interest whatever in the issue of the

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suit, either present or expectant ; and I see nothing in the *character* of his evidence that has the slightest tendency to discredit him. He, too, as well as the rest of the world, believed that his sister was lawfully married to the deceased ; and, *so* believing, could have no inducement to join in obtaining this will as for the advancement of *her* interest ; since, if the lawful wife of the deceased, she would have been more benefited under an intestacy.

Hewitt was present when the greater part of the instructions were given. He proves that they originated entirely with the deceased himself ; not that Mr. Moore, the solicitor, put leading questions to the deceased, to which he merely assented ; but that the deceased dictated the several bequests which the solicitor committed to writing, and read over, successively, in the order in which they were delivered, for the deceased's approval, without any suggestion even on *his* part.

Hewitt was not present at the conclusion of the instructions. The deceased had long been his friend and benefactor ; and he deposes, that he left the room, towards the conclusion of the instructions, overpowered by his feelings at the thought of being then, probably, about to part with that friend and benefactor for ever. He returned, however, soon afterwards, and saw the written instructions lying on the table. He then remarked, he says, "that the deceased had signed the same, and noticed that the name of John was clear, and that there was a blot over the name of Moore, the ink of which was still wet." This witness corroborates Lloyd as to *his* being present *up* to the commencement of the transaction, and his quitting the room, from motives

of delicacy, upon the arrival of the solicitor, as soon as he understood the nature of the business about to be transacted.

It is quite unnecessary to state the deposition of Hewitt in detail. It will be sufficient to observe, that, if he is credible, he proves every thing. He not simply states his own decided *opinion* of the deceased's capacity, but he deposes to *facts*, about which he could not be mistaken, from which the Court can go the whole length of drawing that conclusion for itself.

The other evidence which bears directly upon the *factum* of these instructions is the proof of the death, character, and hand-writing of the solicitor, Mr. Moore. Now, it is proved that this gentleman died in the year 1817, at the advanced age of seventy-eight; and the proofs that are furnished to the Court of his highly respectable character, are even stronger evidence in favour of the will, in some respects, than his own deposition could have been, had he been living and examined in the cause. In that case, the Court would only have had the ordinary *presumption*, that he was a person of *fair*, because of unimpeached, character. But, as it is, his character is *proved* to have been of the first respectability. He was thirty years Vestry Clerk of the parish of St. Pancras; and was employed as a collector of rents, and in various offices of trust and confidence. He was also, and had for many years been, the *deceased's conveyancer*, who was a purchaser of leases, and engaged in several building concerns; consequently, he was well acquainted with the deceased; and not liable, therefore, to form an erroneous impression as to the state of his capacity—and that a person of

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this description, should have engaged in the fraud of obtaining these instructions from a testator whom he knew to be in a state of incapacity and delirium, is quite incredible. In some respects, however, the legatees under the will may suffer from the loss of his direct evidence: but it is the duty of the Court to protect them from suffering by that loss *unduly*. He, if living and examined, could, doubtless, have explained those little variations between the instructions and the instrument drawn up from them (as I shall presently observe)—he could, probably, have also explained how the mistake arose, which has been so much relied upon, about the residence of Knight the executor (a).

But the Court has further, as bearing upon the validity of these instructions, evidence of the conduct of Mr. Moore, the solicitor, as with relation to them *at the time*. The instructions being taken as above, and signed by the deceased, and attested by the solicitor, he is in the less hurry to prepare a will for execution—which is confirmatory of the fact of the deceased *not* having been *then* considered in imminent danger by those about him. A will, however, is actually prepared; and, on the Thursday evening, Mr. Moore desires his assistant, Mr. Ker-

(a) He was described in the instructions as residing in *Southampton Row, Bloomsbury*, whereas it was pleaded and proved, by the next of kin, that he never resided there; but that, “at the time of the date of the instructions, and, for several years prior thereto, he had resided in High Holborn, near Gray’s Inn, which circumstance was well known to the deceased whilst” (as they pleaded it) “he retained the enjoyment of his mental faculties.” How this mistake originated was left unexplained in the cause.

sey, to call at the deceased's house on the next morning, and fix a time for its execution. This is deposed to by Mr. Kersey, as also, that in passing the deceased's house on the following morning, he found the shutters closed, from which he conjectured, as the fact was, that the deceased had died in the course of that night. This conduct, therefore, of the solicitor, at the time, in drawing up a will, and preparing to wait upon the deceased, in order to attest its execution, is plainly inconsistent with any *suspicion*, on his part, that the deceased was incapable at the time of giving the instructions, and is strongly confirmatory of the other, and more direct, evidence of their validity. I may also observe, that Mr. Moore has confirmed this account of the *general* course of the transaction by the sanction of an oath. This I do without adverting, *particularly*, to the contents of his affidavit (a); but

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(a) The 12th article of the allegation propounding the instructions on the part of the executors, pleaded "that, in order to probate of the instructions, as containing the will of the deceased, being granted to the executors, Mr. James Moore was, on the 21st of May, 1812, in conjunction with Mr. Richard Hewitt, duly sworn to an affidavit before a Surrogate of the Judge of this (the Prerogative) Court, in the presence of a Notary Public; and in such affidavit Mr. James Moore made oath, that he knew, and was well acquainted with, Mr. John Moore, the deceased, for several years before, and to the time of, his death; and that, on the 21st of April, then last past, he attended at the house of the deceased, for the purpose of taking instructions for preparing the will of the deceased, and found him ill, and sitting in his bed chamber; and that, from the verbal instructions of the deceased, he then drew, or wrote, the paper writing propounded in this cause, as the will of the deceased; and that, when he had finished writing the same, he read the said paper over in an audible manner to the

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thus much at least being in evidence, namely, that probate of these instructions was obtained *upon* his

deceased, who approved thereof, and subscribed his name thereto; and that *he* set, and subscribed his name to the said instructions, as a witness thereof; and then took the instructions home with him to prepare the deceased's will therefrom; and that the deceased was, at and during the transactions set forth in his affidavit, of sound and disposing mind, and well knew and understood what he said and did." And the next subsequent article of the allegation referred to the affidavit, so made, remaining in the registry, of which a copy was annexed; and pleaded the identity of the parties, and also the hand-writing of the Surrogate and Notary.

The admission of these articles, and the exhibit was opposed, on the part of the next of kin, as a novel attempt, to substitute a voluntary, and extrajudicial, affidavit for direct evidence.

JUDGMENT.

Sir JOHN NICKOLL.

If the professional gentleman, who took the instructions propounded, were still living, his affidavit, though made before this Court, and for the purpose of probate, would be clearly inadmissible as evidence in the cause. It would not, in that case, be the *best* evidence; and the adverse parties would be unduly deprived, by its being admitted as evidence at all, of the right to cross-examine, which must result to them in the event of his being produced and examined as a witness. But in this case, the professional gentleman being dead, it *is* the *best* evidence; and if the adverse parties having lost their opportunity of cross-examining, the loss is to be ascribed to their own laches, in not calling for proof of the instructions earlier*. Mr. James Moore is pleaded to have survived the deceased four years. It would be strange if parties interested to defeat a testamentary paper, could lay by till the death of the solicitor who prepared it; could then object a defect of proof; and at the same time

* It is to be observed, that the Court was not, *at this time*, in possession of the *fact* alleged by the next of kin, in excuse for their not having *earlier* proceeded to contest the validity of these instructions. Vide page 233, *ante*.

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affidavit, I *must* presume that its contents, in general, verified and confirmed the account given by Hewitt and Kersey.

Without therefore any, more particular, reference to this affidavit—without any reference whatever to the evidence of Manwaring, which, to guard itself from prejudice, the Court has not even read—and without invoking the testimony of Betty Roberts, which is also to be taken *as* rejected—the depositions of Lloyd and Hewitt, and the evidence to the character and conduct of Mr. James Moore, satisfy me, that the deceased gave, and signed, these instructions, and was fully competent to the act—for, upon loose evidence of incapacity, given eight or nine years after the death of the testator (evidence for the most part of mere opinion), to discredit the witnesses, Lloyd and Hewitt, and, to some extent, Mr. Moore,

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could object to the solicitor's affidavit (an affidavit made in this Court, and for this very purpose of probate) being received in evidence.

I am not at all, therefore, disposed to shut out of the cause these articles and this exhibit, in *limine*—their value will depend much on the general circumstances of the case, as disclosed in the evidence—*valeant quantum*. At present I admit the articles, leaving it open to the counsel for the next of kin, to renew their objections to the affidavit's being relied on, *as evidence*, at the hearing of the cause; when the Court, being in possession of all the circumstances, will be better able to *finally* dispose of that question agreeably to the equity of the case.

Articles admitted.

The question thus mooted merged, however, to some extent, at the hearing, by the counsel for the executors not insisting on the affidavit being read. The fact of an affidavit having been made by Mr. James Moore for the purpose of probate, was admitted in the cause.

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and to pronounce the whole matter of these instructions false and fraudulent, would be quite extravagant; the more especially, when the dispositive part of them is viewed in connexion with the admitted state of the deceased's affections; with the nature of his relation to this female, with whom he cohabited, as his wife, and her children; and with his often declared intentions relative to the disposition of his property. And as every just presumption, as well as every reasonable probability, was in favour of this will; as it had been acted upon for so many years; and as the parties opposing it had every opportunity of satisfying themselves upon the justice of the case, before commencing the suit; I think that there were no sufficient grounds for calling in the probate; and that their conduct in so doing was unjustifiable. And as these parties have chosen to stand upon their extreme legal rights in calling, at so late a period, for the proof of this will—a will made in exact conformity as well with the deceased's declared intentions, as with his natural affections, and his moral duties, I think that they are liable, at least, to all the costs incurred from the time of giving in their allegation. My only doubt has been, whether in justice they were not liable to the *whole* costs from the time of calling in the probate.

IN THE GOODS OF HIS LATE MAJESTY KING
GEORGE THE THIRD, DECEASED.

(*On Motion.*)

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THE case out of which the present question arose, was described, in the heading of the act to lead the proposed decree, as "a business of citing Iltid Nicholl, Esq. his Majesty's Procurator-General, for, and on behalf of, our Sovereign Lord the King, as heir and successor of his late Majesty King George the Third, deceased, to see the last will and testament, or testamentary schedule, of his said late Majesty, bearing date the 2d day of June, in the year of our Lord 1774, propounded, and proved, in solemn form of law; promoted, and brought, by her Highness Olive, the natural and lawful daughter of his Royal Highness Henry Frederick, the late Duke of Cumberland, deceased, whilst living, the natural and lawful brother of his said late Majesty, the only legatee named in the said will, and there being no executor, or residuary legatee, named in the same—against the said Iltid Nicholl, Esq., his Majesty's Procurator-General."

Application to the Court for its process, calling upon his Majesty's Proctor, to see a testamentary paper of his late Majesty, propounded, and proved—that application rejected; and upon what principles.

On the 1st Session of the present (Trinity) Term, a proctor exhibited, as such, for the party styling herself, her Highness Olive, Princess of Cumberland, as above, and alleged—first, *that* his late most gracious Majesty, George the Third, of the United Kingdom of Great Britain and Ireland, King, &c. departed this life on, or about, the 29th of January, 1820, a widower, leaving behind him his eldest son, his then Royal Highness George Augustus Frede-

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rick, Prince of Wales, Prince Regent of the United Kingdom, who, thereupon, succeeded to the throne of this United Kingdom, and became entitled, in right of his Crown, to all and singular the personal estate and effects of his said late Majesty remaining undisposed of"—secondly, *that* "his said late Majesty, whilst living, made, and executed, his last will and testament, or testamentary schedule, in writing, under his royal sign manual, in manner as required by law, bearing date the 2d day of June, 1774; and therein, bequeathed the sum of 15,000*l.* to his niece, Olive, daughter of his said Majesty's brother, his Royal Highness Henry Frederick Duke of Cumberland; but did not of his said will appoint any executor, or dispose of the residue of his personal estate, and effects." In verification of the premises, he *exhibited* the said last will and testament, or testamentary schedule, together with certain affidavits. Lastly, he *prayed*, that the Court would, on motion of counsel, "decree the said Iltid Nicholl, Esq. his Majesty's Procurator-General, to be cited, by the service of a decree in that behalf, to appear on the sixth day after service, if a Court-day, otherwise on the Court-day next and immediately following, to see, and hear, the said true and original last will and testament, or testamentary schedule, of his said late most gracious Majesty, King George the Third, deceased, bearing date as aforesaid, propounded, and proved, in solemn form of law, if he thought it for the interest of our Sovereign Lord the King so to do; and further to do, and receive, as unto law and justice should appertain, under pain of the law, and contempt thereof, at the promotion of her said

Highness, Olive, Princess of Cumberland, &c. with the *usual* intimation," namely, that "the Court would proceed in the said cause, or business, the absence, or rather contumacy, of him, the said Procurator-General, in anywise notwithstanding."

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The alleged testamentary paper itself was in the following terms:—

" George R.

St. James's.

" In case of our royal demise, we give and bequeath to Olive, our brother of Cumberland's daughter, the sum of 15,000*l.*; commanding our heir, and successor, to pay the same, privately, to our said niece, for her use; as a recompense for the misfortunes she may have known through her father.

" Witness

June 2, 1774.

" J. DUNNING. CHATHAM. WARWICK."

The affidavit of *third parties* in support of the paper went, merely, to the subscriptions, " J. Dunning" and " Warwick," being of the hand-writing respectively, of the late Lord Ashburton (formerly Mr. Dunning) and of the late Earl of Warwick; as also, to the name and letter " George R." at the top of the paper, being the true and proper sign manual of his late Majesty King George the Third. There was no affidavit as to the signature of the late Lord Chatham—but it was sworn, that the whole, body, series, and contents of the instrument (save and except the name and letter " George R." and the *other* subscriptions) as well as the title " Warwick" subscribed, were of the true and proper hand-writing of the late Earl of Warwick.

There was also an affidavit from the party her-

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self promoting the suit, accounting for the plight and condition of the instrument; and for the manner in which it came into her hands. She deposed, *that* “in the beginning of the year 1815, his Royal Highness the late Duke of Kent, informed the deponent, that George, Earl Brooke, and Earl of Warwick, with whom the deponent had been well acquainted from her infancy, had told him, the said Duke of Kent, that he the said Earl of Warwick, wished to communicate to the deponent, some important particulars regarding this deponent’s birth, the purport of which he, the said Duke of Kent, at the same time intimated to the deponent—that one evening happening in, or about, the month of May in the said year, the Duke of Kent, being at this deponent’s house, No. 74, Seymour Place, Bryanstone Square, the said Earl of Warwick also came there; and, in the presence of the said Duke of Kent, after requiring and receiving a most solemn pledge, on the part of the deponent and the said Duke of Kent, not to divulge the purport of the communication he was about to make, until after the death of his then Majesty King George the Third, informed the deponent of her illustrious birth, to wit, that she, the deponent, was and is, the natural and lawful daughter of his Royal Highness the late Duke of Cumberland, deceased; and that the proofs thereof had been deposited with the said Earl of Warwick, for the benefit of the deponent, in case she survived his Majesty, by the late Earl of Chatham and the late Dr. Wilmot, under a solemn pledge to preserve them safely, and to keep them secret, until the demise of his said Majesty—and he, the said Earl of Warwick, further informed the depo-

ment, that the several papers and documents were then at Warwick Castle; and that, apprehending his own health to be precarious, he had considered it incumbent on him to place the same in safe custody—that, shortly after the premises, the said Earl of Warwick having, as he informed the deponent, gone to Warwick for the documents, delivered the papers into the deponent's hands; and part of them were so delivered in the Duke of Kent's presence; and, amongst other things, the paper writing annexed, beginning thus: 'George R. St. James's. In case of our royal demise;' and ending thus: 'she may have known through her father,' bearing date 'June 2d, 1774,' and having the name and titles, 'J. Dunning,' 'Chatham,' and 'Warwick,' respectively set, and subscribed, as witnesses thereto." The deponent further made oath, that the instrument was in the same plight and condition as when so delivered to her. Lastly, she deposed, to her belief *that* the instrument itself so delivered was true and genuine; *that* the name and letter "George R." was the proper sign manual of his late Majesty King George the Third; *that* the name and title "J. Dunning" and "Chatham," subscribed, were so subscribed by the late Lord Ashburton (then Mr. Dunning) and the late Earl of Chatham; and *that* the body of the instrument, together with the date, and the signature "Warwick," were of the proper hand-writing of the late Earl of Warwick:

On the 1st Session of this (Trinity) Term, the Court, upon being *moved*, as above, *ex parte*, directed the matter to stand over, on account of the special nature of the application; and that his Ma-

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jesty's advocate should, in the mean time, be instructed, to shew cause *against* the issue of the proposed citation. In consequence of this intimation, counsel were heard, on the two succeeding Court days, both in support of, and in opposition to, the issue of the process as prayed; and, on this 4th Session, the Court proceeded to dispose of the application in nearly the following words:—

JUDGMENT.

Sir JOHN NICHOLL.

This is an application to the Court for its process, calling upon his Majesty's Proctor to see, and hear, an alleged testamentary paper of his *late* Majesty, propounded and proved. It need hardly be observed, that it is not a matter of choice and discretion, but of justice and duty, to grant or refuse that process according as the law shall direct. The Court has received all the assistance that the learning and ability of counsel could furnish, in support of the application, as well as in opposition to it; and, after that assistance, the Court has, itself, given the subject all that due consideration which its importance, and delicacy appear to require.

The attention of the Court was called, in the course of the argument, to several points—to the right of the Sovereign to make a will—to the form of this particular instrument—to the affidavits exhibited in proof of the hand-writing and history of the paper; and, lastly, to the jurisdiction of the Court to issue the process prayed.

Courts of justice cautiously abstain from deciding more than what the immediate point submitted to their consideration requires. In the present case, several of the points, though properly urged by

counsel, would come more regularly for decision in some future stage of the proceeding; if such a proceeding as is prayed can take place.

The right of the Sovereign to dispose of property by will, if doubted, might be ground for the King's Proctor's appearance under protest, if this Court should think it could cite him at all. The nature of the instrument, whether testamentary or not, might be formally argued upon the admission of an allegation propounding it, in that stage of the proceeding; and its genuineness would be the last, and ultimate, object of the whole proceeding.

Upon these points, therefore, the Court at present expresses no opinion whatever; because assuming them in the affirmative, and, for the present, taking the several allegations in the act of Court to be true, still the first and immediate question is, whether the Court has jurisdiction to institute this inquiry; to entertain such a proceeding; and, consequently, whether it has a right to form any judicial opinion whatever upon these other points.

His late Majesty (and it is so alleged by the party making the application) "did not appoint any executor, or dispose of the residue of his personal property;" but (and it is also so alleged) "his present Majesty became entitled, in right of his Crown, to all the personal estate and effects of his said late Majesty remaining undisposed of." The paper itself, (assuming it to be genuine and testamentary) directs the bequest to be paid "by the heir and successor." This is, therefore, not a question between the asserted legatee, and any subject; either as executor, or residuary legatee, or next of kin. No subject

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is interested in opposing the paper ; but it is directly a claim and demand upon the reigning Sovereign.

The process prayed, is, consequently, in *substance*, against the Sovereign; though in *form* it is described as "a business of citing the King's Proctor:" of citing him, however, it is added, "for and on behalf of our Sovereign Lord the King, as heir and successor of his late Majesty."

When the application was first mentioned, the Court asked the learned counsel if any *precedents* could be furnished ; and it did so at that early stage, in order to set all possible enquiry in motion ; not, however, expecting or requiring a precedent precisely similar in all its circumstances ; but endeavouring to ascertain whether, by diligent research, any proceedings could be found, in this Court, or *elsewhere*, out of which some *principle* could be extracted, either directly, or by way of analogy, furnishing something of legal authority to govern this case.

Now the history of the wills of Sovereigns from Saxon times—from Alfred the Great down to the present day, has been diligently searched and examined ; but no instance has been produced of probate having been taken of the will of any deceased Sovereign in these Courts ; much less of its having been contested here against the reigning Sovereign. One single instance occurs in the Rolls of Parliament of something of a reference to this jurisdiction in respect of a royal will, which is, the instance referred to by Lord Coke (in his 4th Institute (a))

(a) 4 Inst. 335.

and by other writers. It is, in substance, to this effect:—In the 1st of Henry 5, it is stated in the Parliament Rolls, that Henry 4 having made a will, and appointed executors thereof, those executors, fearing the assets would be insufficient, declined to act. It is then recited, that under these circumstances, the effects would be at the disposal of the Archbishop of Canterbury, as ordinary, who should direct them to be sold; but Henry 5, instead of allowing the effects to be sold, took to them, and agreed to pay their appraised value. This is the whole that appears on the Rolls of Parliament: and thence it clearly appears, that *subjects* were the executors—*subjects* alone were interested in the effects bequeathed: and, lastly, that the successor to the Crown voluntarily took to them, and paid their appraised value. But except this recital in the Parliament Rolls, 400 years ago, when the matter was, probably, neither controverted, nor even much considered, not the slightest trace is to be found, of any allusion to, much less of any exercise of, this Court's jurisdiction over the wills of departed Sovereigns.

The only will of a Sovereign deposited in the registry of this Court (for wills of Queens Consort are wills of subjects) is the will of King Henry 8; and that, as I understand, is not the original, but merely a copy; and from the appearance of this copy there is no trace of any probate of the will having ever been taken. Whether this document was deposited here for safe custody, and as a place of notoriety for such a purpose, or for what else, does not appear.

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The statute of the 24th of Henry 8 (*a*), however, has been cited, as conferring upon the Court a jurisdiction in this respect. The object of that statute was to prohibit appeals to Rome; and the statute itself serves to shew, that the reigning Sovereign, at the period of the Reformation at least, became the supreme head of the church—the supreme ordinary of the country. But how it tends to establish, that he became at that time personally subject to the ordinary jurisdiction of the Archbishop, whatever might have been attempted in times of papal usurpation, is certainly not very obvious.

For the last 300 years; and, indeed, from all antecedent time, there is no instance of any Sovereign taking probate in the Archbishop's Court, or of any Sovereign's will having been proved there. Yet if it be true, that by the constitution Sovereigns have always had a right to make wills (and it appears, by the Rolls of Parliament, that in the 16th year of King Richard the Second, "the Bishops, Lords, and Commons, assented in full Parliament, that the King, his heirs and successors, might lawfully make their testaments;") (*b*) and if it is thence to be presumed that Sovereigns, in many instances, have exercised that right, (in which, or to what extent in fact, need not, at present, be inquired, but some instances have been referred to, and one so late as George 1. (*c*)); and if, yet, no instance is to be found of a probate issuing from this Court, nor of any will since the copy of that of Henry 8.

(*a*) 24 Hen. 8. c. 12.

(*b*) Vide 4 Inst. 335.

(*c*) Vide Annual Register, 1772, page 188.

being even deposited here; it does furnish pretty decisive evidence, to my judgment, that this Court, in such a case, has no jurisdiction whatever. What might be the case, if the will of a deceased Sovereign raised a question merely, and exclusively, between subject and subject, the Court is not, at present, required to decide.

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But suppose *no* royal wills to have been made from Henry the Eighth's time to the present, but that all the intermediate Sovereigns have died intestate, still the inference, in respect to this jurisdiction, is the same. Of the effects of all other persons dying *intestate*, the Ordinary grants administration. Before the statutes of administration, the Ordinary granted it to whom he pleased: under the statute of 21 Henry 8. (*a*) it was to the widow or next of kin: and by the statute of distribution (22 & 23 Charles 2. (*b*)) that administrator became a trustee to dispose of, and distribute the property in the manner therein prescribed. Of a Sovereign who dies intestate, the successor is exclusively entitled to the personal property; but in order to have legal authority to collect and recover that property, there is no instance of any such successor coming into this Court (as all other persons must do) for letters of administration—for the authority of the Ordinary to invest him with the legal character of administrator. Nothing of the sort *has* ever taken place: and, indeed, it would be against all principle, and contrary to all analogy, that it *should*. Now the total absence of any *exercise* of such a jurisdiction by this Court on the death of a Sovereign in cases either of testacy or intestacy, is

(a) 21 Hen. 8. c. 5.

(b) 22 & 23 Car. 2. c. 10.

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pretty strong evidence, to my mind, that no such a jurisdiction exists.

The testamentary Courts of the two Archbishops, in their respective provinces, are styled *Prerogative Courts*, from the prerogative of each Archbishop to grant probates, and administrations, where there are *bona notabilia*; but still these are only inferior and subordinate jurisdictions; and the style of these Courts has no connexion with the *royal* prerogative. *Derivatively*, indeed, these Courts are the *King's Ecclesiastical Courts*; the Sovereign being the fountain of all justice, as well as the supreme head of the church; yet, *immediately*, they are only the Courts of the Ecclesiastical Ordinary. The Ordinary, and not the Crown, appoints the Judges of these Courts; they are subject to the restraint and control of the King's Courts of Chancery and Common Law, in case they *exceed* their jurisdiction; and they are subject, in some instances, to the commands of those Courts, if they *decline* to exercise their jurisdiction, when by law they ought to exercise it.

That this Court should, therefore, *now* for the *first* time presume to entertain a suit for so delicate and high a purpose as that of deciding on the validity of the will of the late Sovereign, under any circumstances, and in any form, would require much consideration in point of law. But this is by no means the only, or the greatest, difficulty, which the present application has to surmount.

It is (as has been already stated), in substance, not merely a proceeding to try the validity of the will of his late Majesty, but a *proceeding against the reigning Sovereign*—a demand upon his Majesty,

which is to be enforced, *adversely*, against him. That a process of the nature prayed could not issue directly against the Sovereign himself seems to be admitted, by praying it, *in form*, against the King's proctor. It would be quite a novelty in constitutional law to implead the Sovereign *personally*. These Courts are not presumed to be the best acquainted with the rights and prerogatives of the Crown: in regard to such matters we must look diffidently and respectfully to other authorities; but there seems no principle in the constitution more distinctly laid down by common law writers than that the Sovereign cannot be personally impleaded. Mr. Justice Blackstone, in the first volume of his Commentaries, speaks of the "great and transcendent attributes" which the law ascribes to the King; and first he notices the attribute of *sovereignty*. "He is said," says the learned commentator, "(a) to have *imperial* dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*." "His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, which at the same time declare the King to be the *supreme head of the realm* in matters both civil and ecclesiastical." "Hence it is," he adds, "that no suit or action can be brought against the King even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle without authority to redress; and the sentence of a Court would be contemptible, unless that Court had power to command

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(a) 1 Bl. Com. 242, &c.

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the execution of it; but who, says Finch (a), shall command the King?"

"Are then, it may be asked, the subjects of England totally destitute of remedy, in case the Crown should invade their rights, either by private injuries or public oppressions?" To this we may answer, that "the law has provided a remedy in both cases."

"And, first, as to private injuries; if any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion."

"Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong."

"The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness; and, therefore, if the Crown should be inclined to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth or a private person, the law will not suppose the King to have meant either an unwise or injurious action, but declares that the King was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the Crown has thought proper to employ; for the law will not cast an imputation on that magistrate whom it trusts with the executive power, as if he was capable of intentionally dis-

(a) Finch. L. 83.

regarding his trust, but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the Prince, might lessen him in the eyes of his subjects."

Again, speaking of the King as the foundation of justice, this author says, "A consequence of his prerogative is the legal *ubiquity* of the King. His Majesty, in the eye of the law, is always present in all his Courts, though he cannot personally distribute justice." "And from this ubiquity it follows, that the King can never be nonsuit; for a nonsuit is a desertion of the suit or action by the non-appearance of the plaintiff in Court. For the same reason also, in the forms of legal proceedings, the King is not said to appear by his attorney as other men do; for, in contemplation of law, he is always present in Court."

Again, in the third volume, speaking more in detail of the modes of proceeding to obtain property from the Sovereign, Mr. Justice Blackstone says<sup>(a)</sup>, "The common law methods of obtaining possession or restitution from the Crown of either real or personal property, are, 1. By *petition de droit*, or petition of right, which is said to owe its original to Edward the First; 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer."

This Court is not sufficiently acquainted with the proceedings of other Courts to say whether this mode of proceeding is the proper remedy, if the

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(a) 3 Bl. Com. 256, &c.

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right here set up exists. All that this Court presumes to decide is, whether the remedy can be obtained here in the mode prayed; it is not necessary for me to decide whether any and what remedy can be obtained elsewhere.

Now to proceed by this sort of process against the King himself; to cite *him* personally; to put *him* in contempt; to do certain acts in pain of *his* contumacy—was too extravagant even to be attempted; and therefore the citation is prayed against the King's proctor.

But here, again, exactly the same difficulty occurs, both in principle and practice. Either the King's proctor does, or does not, represent the Sovereign. If, *virtute officii*, he represents his Majesty, he has the same privileges; nor can *he* be put in contempt, and proceeded against *in panam*. If he does not officially, *quoad hoc*, and so as to be binding upon, represent, the Sovereign, this process is nugatory. It may be sufficient to add, that the King, as has been said, does not appear *by his attorney*; and that no instance or precedent exists of making the King's proctor a defendant, so as to bind the Sovereign in a matter touching his personal rights. The present King's proctor has, by his warrant of appointment, the same, but no greater, powers given him than those exercised by his predecessors. He is a mere law agent of his Majesty to watch the interests of the Crown, and to assert them, when so directed, either by originating proceedings, or by intervening when suits have been brought by others; but it does not follow that the Court can compel him to be a defendant; can put him in contempt, and proceed *in pain* of his contumacy. So the King



*may be a voluntary plaintiff in other Courts; he is the public prosecutor; criminal suits are conducted in his name; and his attorney-general may originate other proceedings. But it clearly does not result, as we have just seen, that because he may be voluntary plaintiff, he can be made a defendant by compulsion, in other Courts.*

The case of the King's proctor appearing for the Crown, to assert its right to the property of illegitimate persons dying unmarried and intestate, which has been referred to in the argument, is the very opposite of the present. *There* he asserts a right on the part of the Crown; *here* he is to be made a defendant to resist a claim set up against it. And even, in that case, the King's proctor cannot proceed, officially, without a warrant under the sign manual, countersigned by three Lords of the Treasury; and then only on behalf of a nominee appointed in that warrant. And this, by the way, is conformable and analogous to what Lord Coke states in his 4th Institute (a), that "when the King is made an executor of the will of another, the King doth appoint certain persons to take execution of the will upon them (against whom such as have cause of suit may bring their action), and appointeth others to take the accounts." But in no case is the King's proctor *ex officio* competent, much less compellable, to have suits brought against him, and to be impleaded, so as to bind the Sovereign.

The notice served on the King's proctor in cases of proceedings by creditors to obtain an administration where a person is dead, intestate, without

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MAJESTY  
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(a) 4 Inst. 335.

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known relations, has also been mentioned in the argument. But that is a *mere* notice, and not at all for the purpose of proceeding *in p̄nam*, so as to bind, or affect the right of, the Crown. It is quite modern practice, too, very lately directed by the Court *ex cautela* to guard against surprise and oversight; for, although, *in law*, the King's proctor is at all times present in Court, still a notice, *in fact*, is preferable, lest a creditor, perhaps, to a trifling amount, should, under an assertion of their being no relations, obtain possession of, possibly, a large property: and the notice which the Court expects to be given to the King's proctor, in these cases, is to *preserve* the rights of the Crown in the event of *no* relations appearing; and for the benefit of those relations, if afterwards any should appear. So different, therefore, is that from the present proceeding, that it furnishes no analogy to warrant it. This is directly a demand against the Sovereign of property, in the contemplation of the law, already in possession of the Sovereign.

It has been said that the statute 39 & 40 Geo. 3. (a) having given, or at least regulated the Sovereign's right to dispose of his property by will, must afford the means of giving effect to his disposition. But such a general deduction is not sufficient, in point of law, to give a new jurisdiction to this Court, which it never before exercised, of proceeding against the reigning Sovereign. That could only be done by clear and express enactment. What inconsistency is there in supposing that the legislature, though it declared and regulated the Sovereign's right of tes-

(a) 39 &amp; 40 Geo. 3. c. 83.

tacy, chose to leave the mode of proceeding respecting his will where it stood before? Why, is it to be supposed that the legislature meant, in future, to submit the reigning successor to the authority of an ordinary jurisdiction, to which no Sovereign had ever before been subjected, and which would be a departure from, and violation of the principles of, the constitutional prerogatives of the Crown? It was said that it would be a mockery to recognize the power of one Sovereign to make a will, and yet to leave a power in his successor to defeat its operation; and so it would be, if the successor could be supposed capable of exercising any power of that sort. It would be in some degree presumptuous, and almost disrespectful, for the Court to express its full conviction of the impossibility of his Majesty, personally, entertaining the slightest disposition to exercise any such power of defeasance. The Sovereign can have no personal wish on this subject but that of doing justice. The law itself, indeed, does not permit the contrary to be even suspected. The King can do no wrong; he cannot, constitutionally, be supposed capable of injustice. If properly applied to in the forms prescribed by law and the constitution, no doubt ought to exist that real justice will be done. What the real justice of the case may be, this Court, in my judgment, has not the authority to decide; and being of that opinion, the Court holds itself bound by law to reject the present application.

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IN THE GOODS  
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## HOBSON v. BLACKBURN and BLACKBURN.

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(On the Admission of an Allegation.)

4th Session.

Mutual, or  
conjoint, wills  
(so styled), ir-  
revocable by  
either of the  
(supposed) tes-  
tators, un-  
known to the  
testamentary  
law of this  
country; what  
effect soever  
may be given  
to such instru-  
ments in equi-  
ty.—An alle-  
gation, prop-  
ounding an  
instrument of  
this species,  
rejected; and  
a separate will  
of the same  
deceased, of a  
later date, in  
effect pro-  
nounced for.

**M**ARTHA HOBSON, Susannah Hobson, and Joshua Hobson, sisters and brother, made the following conjoint or mutual will, dated on the 2d day of September, 1794:—

We, Martha, Susannah, and Joshua Hobson, being in health of body and sound in mind, do agree to the following assignment of our property in case of each other's decease, exclusive of five hundred pounds, the disposal of which we propose leaving a memorandum of, according to our particular liking. The remainder of our property we resolve to be left in this manner:—The whole of the interest of it, excluding the above mentioned five hundred, shall devolve to the longest life or lives while continuing single; but, if the survivors marry, the property of the deceased shall be immediately distributed equally amongst our brothers and sisters, viz. William Hobson, Lydia Blackburn, Hannah Blades, and George Hobson, including survivor or survivors of this testament, who are to have an equal share with the rest; or in case of their decease, viz. our above mentioned brothers and sisters, their share to be equally distributed among their children; or in case one of the survivors marrying, the single survivor shall have the interest of the property of the deceased during the time of his or her remaining single, but after marriage to have no more

claim than any other part of the family ; and on the demise of the last of us three, provided he or she remained single during life, the property of the other two shall be equally divided amongst our remaining brothers and sisters ; or, in case of their decease, their share to be equally divided amongst their children, with this provision, that the property of the last survivor shall be entirely at their own disposal. We agree to leave each other, with our brothers William and George Hobson, executors, to this our last will and testament, to which we put our hands this 2d day of September, 1794.

MARTHA HOBSON.

SUSANNAH HOBSON.

JOSHUA HOBSON.

Witness, *George Hobson.*

Joshua Hobson died in the month of October, 1796, a bachelor, and without having altered or revoked his part of the said mutual will ; a probate of which, as to the effects of the said Joshua Hobson, was granted in August, 1799, to Martha Hobson, spinster, Susannah Hobson, spinster, and George Hobson, three of the executors named in the same. And Martha Hobson and Susannah Hobson enjoyed the income so derived, arising from the property of Joshua Hobson, till the death of Martha in the month of December, 1820, a spinster, leaving Susannah, also a spinster, still surviving.

On the 30th of November, 1820, Martha Hobson made the following *separate* testamentary disposition of her property :—

As my last will I leave to my dear sister, Lydia Blackburn, my share of the undivided property in my dear father's estates ; to my dear sister, Susannah

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 and
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Hobson, I leave the income arising from the whole of my funded property for her life; I also leave to her my plate, books, furniture, and such of my apparel as she may like to take, the remainder of my apparel I wish to be given away to any person my sister Susannah may think proper; and, after the demise of my dear sister Susannah Hobson, I leave the whole of my funded property to be divided equally between my nephew William Blackburn, and my nieces Lydia Blackburn, Eleonora Blackburn, Elizabeth Blades, Caroline Blades, and Laura Blades.

I leave my sister Susannah Hobson, executrix, and my brother George Hobson, executor, to this my will.

Buckwell Hall, Dulwich,
 30th November, 1820.

MARTHA HOBSON

Witness, *George Hobson.*

Probate of the *joint* will, as that of Martha Hobson, the party deceased in this cause, was prayed by George Hobson, one of the surviving executors named in the said *joint* will, on the one hand; and letters of administration, with the *separate* will annexed, as that of the same deceased, were prayed by the nieces and two of the legatees named in the said *separate* will, on the other hand.

The allegations propounding these instruments, respectively, were, in effect, mere common *condidits*, except in the following particulars:—The allegation propounding the *joint* will further pleaded the death of Joshua Hobson, a bachelor, in October, 1796, and that probate of the said *joint* will, as to the effects of Joshua Hobson, was taken by the deceased in

the month of August, 1799. The allegation propounding the *separate* will further alleged, "*that* at the time of making the joint will, and also at the time of the death of the said Joshua Hobson, the whole of the personal estate and effects of the said Martha Hobson, spinster, the party in this cause deceased, did not exceed in value the sum of 8000*l.*; and that she was, at the time of her making and executing her *true* last will and testament [namely, the one propounded], and at the time of her death, possessed of, and entitled to, personal estate and effects of the amount or value of 13,000*l.* or thereabouts—*that* the value of the estate and effects of the said Joshua Hobson, at the time of the making of the *said* joint will, was about 8000*l.*; and at the time of his death did not exceed the sum of 6650*l.*—and that the value of the estate and effects of the said Susannah Hobson, spinster, at such time [that is, at the time of making the joint will] did not exceed the sum of 8000*l.*"

Of these allegations, that propounding the joint will of September, 1794, was opposed on behalf of the nieces, who propounded the separate will of November, 1820.

JUDGMENT.

Sir JOHN NICHOLL.

I have no hesitation whatever in rejecting the allegation, propounding the mutual, or conjoint, will, as that of the party deceased in this cause, on the principle, that an instrument of this nature is unknown to the *testamentary* law of this country; or, in other words, that it is unknown, *as a will*, to the law of this country at all. It *may*, for aught that I know, be valid *as a compact*—it *may* be operative,

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and
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in equity, to the extent of making the devisees of the will trustees for performing the deceased's part of the compact (a). But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's will, and to that only. The allegation plainly proceeds upon a notion of the *irrevocability* of the instrument which it propounds as the *will* of the deceased. Why this very circumstance destroys its essence as a will (b), and converts it into a *contract*; a species

(a) As in the case of Dufour and Perraro: see the judgment of Lord Camden in that case, delivered 18th July, 1769, in Hargrave's Jurid. Exer. vol. ii. p. 101.

In the Walpole case, George Earl of Orford's will of 1756, and Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual will. Horace Lord Walpole died in 1757, without revoking his part of the mutual will, namely, the codicil of 1756. George Earl of Orford died in 1791, when it appeared that he had made a codicil in 1776; and this, by reason of a reference to his *last will* bearing date in 1752, was construed a revocation of his part of the mutual will, namely, the will of 1756. [Vide pages 38, 39, ante; and 7 Durnf. & East, 138.] A case was then raised, in equity, that the mutual will of 1756 became *irrevocable* on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either, during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden in Dufour and Perraro, was mainly relied on in support of that position. The compact of the mutual will was *not* enforced, however, in the Walpole case; but this was chiefly, it seems, by reason of the *uncertainty*, and, in some sense, unfairness, of the compact: so that it leaves the principle of Lord Camden's decision in Dufour and Perraro wholly unshaken. See 3 Ves. 403.

(b) The making of a will is but the inception of it, and it doth not take effect till the death of the testator: for, *omne testamentum morte consummatum est; et voluntas est ambulatoria, usque ad extremum vitæ terminum.* Then shall it be against the nature of a will to be so absolute, that he who maketh the same,

of instrument over which this Court has no jurisdiction. Upon these broad, and, as I apprehend, sufficiently intelligible grounds, I reject this allegation.

Allegation rejected.

being of good and perfect memory, cannot countermand it. *Forse and Hembling's case*, 4 Rep. 61.

If a man make his testament and last will *irrevocably*, yet he may revoke it; for his acts or his words cannot alter the judgment of the law, to make that irrevocable which, of its own nature, is revocable. *Vinyor's case*, 8 Rep. 81.

So Swinburne, in treating of the revocation of testaments, wherein are express clauses, even, derogatory of the power of making future testaments, as "I do from henceforth renounce the power of making any other testament," or the like, lays down, that such testaments are avoided by testaments of a later date, precisely as if they contained no such derogatory clauses. "The reason," he adds, "is, because the clause derogatory of the power of making testaments is utterly void in law; nor can a man renounce the power or liberty of making testaments; neither is there any cautel under heaven to prevent this liberty, which also endureth whilst any life endureth." *Swinb. p. 504.* See also to the same effect, pages 101, 102, 501, &c.

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DEW v. CLARK and CLARK.

(On the Admission of an Allegation.)

ELY STOTT, the deceased in this cause, died on the 18th of November, 1821, leaving behind him a widow, and Charlotte Mary Dew, his natural and lawful, and only, child. The deceased died possessed of a considerable personal property, amounting in value to about 40,000*l.*

sanity, in order to defeat a will,

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Bye Day.

Partial insanity may invalidate a will, which is fairly to be inferred the direct offspring of that partial insanity.—An allegation pleading partial insanity, in order to defeat a will, admitted.

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DEW
v.
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CLARK.

The present question arose as to the admissibility of a plea tendered on the part of Charlotte Mary Dew, responsive to an allegation or common *con-didit* given and admitted on the parts of Thomas and Valentine Clark, the residuary legatees therein named, pleading and propounding a testamentary paper, bearing date on the 26th of May, 1818, as the last will of the deceased.

The allegation (after pleading, in the first article, the death and circumstances of the deceased) went on to plead, in substance—

2. That in the year 1774 the deceased intermarried with Mary Simson, the mother of Charlotte Mary Dew, party in the cause—that shortly after the said marriage he betrayed great violence and irritability of temper especially towards his said wife, and conducted himself as a person labouring under mental derangement—that a few days after his wife was delivered of the said Charlotte Mary Dew, in the month of November, 1788, the deceased, who then practised as a surgeon, directed that she should be taken from her bed and washed from head to foot with cold water—that this order was reluctantly complied with by the persons attending her under the deceased's peremptory injunctions; in consequence of which extraordinary treatment his said wife became very ill, and died in about ten days.

3. That immediately after the birth of the said Charlotte Mary Dew the deceased shewed great antipathy to her, and refused to see her for two or three years—that he laboured under great and continued delusion of mind respecting his said daughter; declaring, whilst she was in her earliest infancy, that

she was invested by nature with a singular depravity—was born to become the peculiar victim of vice and evil—was the special property of Satan, &c. That the deceased, as his said daughter advanced in life, persisted in similar assertions, and continued to entertain a similar notion respecting his said daughter, at all times to the time of his own death.

4. That the said Charlotte Mary Dew, notwithstanding, constantly felt and expressed a filial affection for the deceased, and behaved to him with respect and attention—that she conducted herself, on all occasions, with decorum and propriety; was a person of strictly moral and religious habits; and was so known to be by many persons of high character and reputation.

The subsequent articles of the allegation, eighteen in number (with the exception of one at the end, reciting and contradicting the *condidit*), instanced a variety of circumstances, as well evincing the deceased's *insane* aversion to his daughter, pleaded in the third article, as tending to shew, that he laboured under mental perversion in some other particulars, especially on religious subjects.

The admission of this allegation was opposed on the behalf of Thomas and Valentine Clark, as stating, on the face of it, a mere case of great and apparently unfounded, but still not *insane*, dislike—that nothing could impeach the will short of legal insanity, to a case of which, it was contended, that no proof taken upon this allegation could be expected to amount. In particular it was argued, that the will itself was incompatible with any notion of the deceased's aversion to the party who appeared in

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 ~~~~~  
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opposition to it, being founded in insanity—that the deceased could not be mad *quoad hanc* by halves—that irrational antipathy *must* have operated with him to the *total* exclusion of its object from his testamentary bounty; but that a series of testamentary scripts was before the Court, in each of which the daughter was benefitted; and that the very will sought to be impeached bequeathed her 100*l. per annum*—a legacy, which, however inadequate, perhaps, to her views and expectancies, was conclusive to shew that the testator's disaffection to his daughter was not such as to preclude him from exercising a discretion in testamentary matters, even with respect to *her*; and, consequently, that it could not avail to call in question his *general* testamentary capacity.

Some objections were also taken to particular parts of the allegation, in the event of the Court declining to reject it as a whole.

#### JUDGMENT.

Sir JOHN NICHOLL.

The present case is one of a singular complexion; but it is one which I am not disposed to stop, *in limine*, by repelling this allegation; especially being, as it is, set up on the part of an only child.

The case, in substance, is one of partial insanity—of insanity *quoad hoc*, upon a particular subject; or rather, perhaps, *quoad hanc*, as to a particular person—that person being the deceased's daughter, and only next of kin. It is *alleged*, in the plea now tendered to the Court, that the deceased conceived a dislike to this only child, founded purely on illusion; and it is *inferred*, that he was actuated solely by that illusion, to dispose of his property in the manner in

which it is purported to be conveyed; by the will propounded in the allegation to which this plea is responsive.

Now the *possible* occurrence of such a case of partial insanity, and that proof of it *may* invalidate a will, which is fairly presumable to have been made under its direct and immediate operation, must be admitted on the authority of Greenwood's case (a), though the last verdict in that case, if I remember, established the will. And this being so I am by no means prepared to say, that *no* case made out in evidence, taken *as* upon the plea now tendered, could induce me to relieve the party who tenders it; against the operation of the will sought to be impeached. At the same time I must observe, first, that the plea is one of that sort to which it is not very likely that the proof *will* come up; and, secondly, that, even if it *does*, I by no means pledge myself to pronounce against the will. Being a case however, which I cannot determine satisfactorily to

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(a) The following is an outline of Greenwood's case (often referred to in argument, but of which the Editor is not aware that there is any printed report) as stated in Mr. (now Lord) Erskine's speech, on the trial of James Hadfield, for shooting at his late Majesty, at Drury Lane Theatre. "The deceased, Mr. Greenwood, *whilst insane*, took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c. but could never divest his mind of the morbid delusion, that his brother had attempted to poison him; under the influence of which (so said) he disinherited him. On a trial in the Court of King's Bench upon an issue, *deviavit vel non*, the Jury found *against* the will; but a contrary verdict was had in the Court of Common Pleas; and the suit ended in a compromise."

1852.  
Trinity  
Term.

DEW  
v.  
CLARK  
and  
CLARK.

my mind *against* the party who sets it up, in this stage of it, I think that I am bound to admit the allegation, as by so doing, I give her the option of proceeding with the cause, if she thinks proper. She must be apprized, however, as well that the burthen of proof rests with her, as that this burthen, in my judgment, is, from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out, than Greenwood's case, in *one* respect, as the delusion under which *this* deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although *here*, as in Greenwood's case, the general capacity is, in substance, unimpeached. But she must understand that no course of harsh treatment—no sudden bursts of violence—no display of unkind, or even unnatural feeling, *merely*, can avail in proof of her allegation—she can only prove it by making out a case of antipathy, clearly revolvable into mental perversion; and plainly evincing, that the deceased was *insane* as to *her*, notwithstanding his general sanity.

Without, then, committing the Court as to what may be its ultimate opinion, even should the facts pleaded in this allegation be proved, it is not an allegation which I think myself justified in precluding from going to proof. The case set up in the plea, to say the least, savours strongly of being one of partial insanity; and it is too much to say, in the first instance, that a will which can be argued, with any face of probability, to have been the direct offspring of that partial insanity if it be proved to have existed, can, upon no such proof of its actual

existence as *may* result from the evidence taken upon this plea, be relieved against.

Being disposed, therefore, to over-rule the objections taken to the allegation, as a whole; the objections taken to parts of it are of no great weight in my mind. They are nearly all resolvable into this general objection, namely, that the case, as laid, embraces a considerable period of time, and must lead to a considerable bulk of evidence. But these are results to which the setting up of such a case leads, unavoidably. It is hardly possible for the Court to form a right judgment of the deceased's state of mind in the particular in question, without his whole history, so far as respects that particular, being laid before it. It was incumbent, therefore, on the party, to go into some minuteness of detail on this point; and to take up the history from an early period. Nor do some objections, to one or two articles, of another nature, appear to me, altogether, well founded. It is said, for instance, that, under the 19th article, the Court could only be furnished with Mr. Bartlett's opinion. Why, that is not exactly so. Mr. Bartlett, in stating his opinion, that the deceased was insane, will, of course, at the same time, state his reasons for it—and his reasons may have weight with the Court, though his mere opinion may have little, if any.

Upon the whole, then, I admit the allegation; leaving it for the party to proceed with, or drop the suit *ad libitum*. Upon the expediency of the former measure she will advise with her counsel; the propriety, under all the circumstances, she must determine for herself.

Allegation admitted.

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FILEWOOD v. COUSENS and Others.

4th July.

A pauper, so admitted in the middle of a suit, may, at least, be condemned in costs, up to the time of his being admitted pauper.

**THIS** was a question respecting the force, and validity, of the asserted last will and testament of Charles Elms, late of Leicester Square, in the county of Middlesex, the party deceased in the cause, bearing date on the 10th of February, 1820. It was propounded by Mr. John Cousens, the deceased's son-in-law, and one of the executors named in it; and was opposed by Harriet Filewood, the sole executrix under a will of the same deceased, dated on the 3d of February, 1810. The suit commenced as long back as in Michaelmas Term, 1820; and counter allegations had been filed; witnesses had been examined on both; and publication was prayed; when, on the 1st Session of Hilary Term, 1822, Mr. John Cousens appeared, and was admitted *a pauper*. Other proceedings were, subsequently, had on the cause, which now stood for sentence, having been argued upon two preceding days.

JUDGMENT.

Sir JOHN NICHOLL.

[After recapitulating, and commenting upon, the evidence.]

Upon this evidence, I have no doubt in pronouncing *against* the paper propounded, and should have as little, in condemning the party, who has been rash enough to propound it, in costs, but from the circumstance of his *now* appearing before the Court as a suitor *in formâ pauperis*. In the *superior* Courts, at least, of *common law*, paupers, so admitted



under 2 Hen. 7. c. 12. are excused from paying costs, when plaintiffs, by 23 Hen. 8. c. 15. (a); at the same time they are liable, under that statute, to suffer whipping, or other punishment, at the discretion of the Judges: and it was formerly the custom—(a custom, said, however, more than a century back, to have fallen into disuse, even at that time (b))—to give paupers, if *nonsuited*, their election either to be whipped, or to pay their costs, notwithstanding their exemption from costs under the statute of Hen. 8. to which I have just referred. But I am not aware that *this Court* either is, or, indeed, ever was authorized to order a suitor before it, *in formâ pauperis*, to be punished by whipping or otherwise, under what circumstances soever of misconduct. And supposing the Court to be at liberty, notwithstanding the statute of Hen. 8. to condemn a pauper in costs, and put him in contempt, &c. for non-payment (c), I should still be unwilling to proceed to that extremity in the absence of a precedent; no instance of the sort having occurred in these Courts, at least that I am apprized of.

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v.  
COOPER  
and Others.

(a) See 23 Hen. 8. c. 15. in conjunction with 11 Hen. 7. c. 12. The statute of Hen. 8. is limited, however, to *particular suits*; in which particular suits only, it should, therefore, seem, that paupers could claim to be exempt from paying costs, at least, under that statute.

(b) See 1 Sid. 261. 7 Mod. 114.

(c) Which, however, the Editor apprehends, would have been consonant with the practice of the Chancery in this respect, where a pauper may be *committed* for filing an improper bill—that is, where the bill may be dismissed with costs; and the pauper be committed, in default of payment. See *Ex parte Shaw*, 2 Ves. jun. 40, and *Peirson v. Belchier*, 4 Ves. 630.

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v.  
COUSINS  
and Others.

Meantime—in order to mark my sense of the iniquity of the present suit, and by way of interposing some check to cases of this description, which have occurred too frequently, in recent instances—I adopt a middle course, as to which I feel myself at perfect liberty, by condemning this pauper in costs of the suit, up to the time of his being admitted a pauper; and I pronounce accordingly.

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IN THE CONSISTORY COURT OF LONDON.

GREEN, falsely called DALTON v. DALTON.

1822.  
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1st Session.

**SOPHIA GREEN**, the natural and lawful daughter of William and Maria Green, of Oxford Street, in the parish of Mary-le-bonne, was born on the 31st of December, 1802. On the 26th January, 1803, she was baptized by the name of "Sophia" only, and from the time of her said baptism, was called and known by no other name. On the 23d of February, 1820, a marriage was had and solemnized in the parish church of St. Mary, Islington, between Thomas Dalton (the party proceeded against) and the said Sophia Green, in virtue of banns of marriage three times previously published in the said parish church, *as* between Thomas Dalton and Sophia "Augusta" Green. This was a suit brought by William Green, the father, to annul the said marriage, on the grounds of minority, want of consent, and such *undue* publication of banns.

A marriage annulled by reason of undue publication of banns [the name of "Augusta" being inserted between the true, and only, christian, and the surname] under the 26 Geo. 2. c. 33.

It was clearly established in evidence, that the minor, Sophia Green, was so born and baptized; and was so known by the christian name of "*Sophia*" only. It was also clearly established, that the banns were so published, *as* between Thomas Dalton, and Sophia "Augusta" Green, in the church of a parish to which neither of the said parties belonged; that the marriage had, pursuant thereto, was unknown to the said William Green till the month of June following, the said Sophia Green returning immediately to her

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said father's, and living with her parents as before; and that the said William Green expressed the utmost grief and surprize at the discovery of it. It appeared that the banns under which the marriage was had, were delivered by the *de facto* husband; but the entry of the marriage in the parish register book was signed by the wife, Sophia "*Augusta*" Green. It did not appear that there was any disparity of age or condition in the parties; but the party proceeded against neither gave a plea, nor put a single interrogatory to either of the ten witnesses examined upon the libel.

The Judge (Sir CHRISTOPHER ROBINSON)

Held, that this use of the name "*Augusta*," in the publication of banns upon the occasion of the said marriage, was to be deemed a fraud of both parties on the rights of a third party, the father; and as intended, by misleading that third party, to effect a marriage, the celebration which might else, possibly, have been prevented. He admitted that the insertion of the name "*Augusta*," as not entirely confounding the identity of the wife, was open to *explanation*, but held, that as no explanation was tendered even by the husband, he was bound to consider that it admitted of no satisfactory one; and, therefore, to conclude against the *bond fides* of the insertion; and, consequently, to pronounce the marriage null and void (a).

(a) See note (a) page 94, ante.

END OF TRINITY TERM.

**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**ECCLESIASTICAL COURTS**  
**AT**  
**Doctors' Commons;**  
**AND IN THE**  
**HIGH COURT OF DELEGATES.**

ARCHES COURT OF CANTERBURY.

SAUNDER v. DAVIES.

*(By Letters of Request from the Chancellor of  
the Diocese of Oxford).*

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1st Session.

**JUDGMENT.**

Sir JOHN NICHOLL.

This is a cause of office promoted by Samuel Saunder, a parishioner of Charlbury, against David Griffith Davies, licensed curate of the augmented curacy of Ascot, and curate of the parish of Charlbury, both in the county and diocese of Oxford, for drunkenness and profaneness, immorality, and irregularity and indecorum in the performance of divine offices. It was instituted in this Court, in the first instance, by virtue of letters of request from the Chancellor of the diocese of Oxford.

In proof of the articles given in, and admitted, on the part of the promovent, containing the facts

A clergyman suspended, under a proceeding by articles, for drunkenness, profaneness, &c. Quære as to the right of the dean of the Arches, per se, to depose, or deprive, in any case, under the 12th canon.

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charged in due detail, eighteen witnesses have been examined. An allegation has also been brought in, and admitted, on behalf of the defendant, but no witnesses have been produced upon it—the defendant suggesting his inability to examine witnesses by reason of pecuniary embarrassments; and now declining, for the same suggested reason, to appear by counsel. This course of proceeding imposes upon the Court the duty of examining the proofs in the cause with the strictest possible attention, in order that Mr. Davies may have the full benefit of any defect or failure of evidence. It is the duty indeed of the Court to bestow this attention upon the proofs in criminal proceedings under any circumstances; but it is more peculiarly its duty where, as in this case, the absence of counsel for the defendant devolves upon it the whole *onus* of sustaining the defence. For where the Court performs that duty in common with counsel, it may be pretty certain that their zeal and talent will fully obviate any ill effect of its own, possibly, relaxed vigilance. But the Court is sorry to say that all its attention to the proofs in this case has furnished nothing which can suggest a doubt even, in the defendant's favor. On the contrary, it is bound to pronounce the articles admitted in the cause sufficiently, and more than sufficiently, proved—and that by witnesses, not only competent, but, nearly in every instance, fully credible.

The first article merely pleads the general law applicable to offences of this nature committed by persons in holy orders, and neither is, nor of course requires to be, sustained by oral evidence. The circumstances pleaded in the next following articles to

the sixth inclusive, namely, the clerical character of the defendant, and his being licensed to the curacies of Ascot and Charlbury, are sufficiently established by the eight first witnesses, and the eighteenth witness, the witness to the exhibits. Upon these facts indeed no question has been raised; nor were they attempted to be controverted by the defendant in plea. The criminal charges begin at the seventh article, which objects to the defendant, *habitual* drunkenness and profaneness—being the first of the three branches into which the whole accusation may, not improperly, be considered as dividing itself.

Upon this general article no fewer than sixteen witnesses have been examined. These witnesses, who are persons in various classes and occupations, clearly convict the defendant in both these particulars. They differ something as to the *degree* of intoxication in which the defendant was in the habit of indulging—but in all other respects they depose, upon this general article, with pretty much of accord. In short, that the defendant was in the *habit* of resorting to inns and alehouses in his own and neighbouring parishes “without any honest necessity,”—that he was in the *habit* of drinking to excess, and running up scores, there, although occasionally *paid for*;—lastly, that he was in the *habit*, both there and elsewhere, of profane swearing, and of talking very grossly, immorally, and obscenely—is substantiated by their testimony in too convincing a manner to leave the facts at all disputable. And, which is most extraordinary, Mr. Davies appears to have adopted, and persisted in, this line of conduct, extremely reprehensible

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in any individual, but highly criminal in a clergyman having cure of souls, without any shew of disguise. He commits these excesses, indifferently, in the parlour, bar, or kitchen of any public house in his neighbourhood, according to the class of company into which he happens to fall—this being a matter which, at no time, seems to have occasioned him any sort of anxiety.

Having said that this defendant's *habits* of drunkenness and profaneness are established to the conviction of the Court, it will not be required of it to descend into the *particular instances*. It would even be improper, if not absolutely indispensable, for reasons that will readily suggest themselves to every considerate mind. It remains therefore only to say of the three next following articles, that they go to particular instances—and that each of the three, one of extreme grossness, is satisfactorily proved. An attempt which has been made to discredit two of the witnesses produced upon these articles, Evans, and a witness named Jonah Smith, by means of interrogatories, has wholly failed.

The eleventh article charges the defendant with being, almost more than, passive to a criminal connexion, between his own wife and a young man who had been his pupil. This indeed is a part of the case too odious to be dwelt upon, and which the Court deeply laments the necessity of adverting to. It remains only to say that the charge, incredible as it seems, is positively deposed to, in a manner not to be explained away, by three witnesses—young women who had lived, at different times, in the defendant's service.—Two of these again are attempted to be discredited by interrogatories, but



still unsuccessfully—and the third, a young woman, named Bursom, is a witness above all impeachment. She *established*, indeed, her own character, by taking steps for leaving the defendant's service, the instant she discovered the gross immoralities practised in his family. Her evidence, in conjunction with that of the other two witnesses, satisfies my mind that not a doubt can be entertained of the truth of this charge—incredible, I repeat, as it seems, and revolting, in its nature, as it undoubtedly is.

The twelfth article objects to the defendant irregularity in the time, and indecency in the mode, of performing divine service. Eight witnesses have been examined upon it—whose depositions clearly prove the defendant's culpability in both these respects. As to the last indeed, which is partly matter of opinion, there is some contrariety again among the witnesses, in point of *degree*; owing, probably, to their being differently affected, both towards the defendant himself, and towards the offices which he had to perform. But that the defendant frequently read the service with most indecent haste, and that, on some occasions of performing divine offices, he has not been perfectly sober, is indisputable upon this evidence. And it is proved upon the thirteenth article, what perhaps would have been matter of just inference, without any proof, that the congregations at the defendant's churches, owing to such conduct on his part, have sensibly diminished. It is also proved, that a baptist meeting-house has sprung up, now for the first time, at Chadlington, which several of the witnesses ascribe solely to the defendant's mode of doing duty in the church of that parish, coupled with the scandal occasioned by his

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general misbehaviour. Hence it plainly appears, that he has done a sensible injury to the cause, if not of religion itself, still, of that church, the interests of which he stood solemnly pledged, by his ordination vows, to sustain and support.

These charges being thus established by proof, the only remaining consideration is, the correction to be applied. The articles conclude with praying, generally, that the defendant may be punished "according to the exigency of the law;" but the first article, adverting to correction specifically, pleads, that clerks in holy orders are liable, for offences of this nature, to be deprived of their ecclesiastical benefices, and suspended from the exercise of their clerical functions, by the ecclesiastical canons and constitutions of the Church of England, as by law established. And the Court is now given to understand, by the counsel for the promovent, that the sentence prayed against this defendant is the first of these, or a sentence of deprivation.

It appears however to the Court, in spite of what has been urged to the contrary, that deprivation is a penalty which it is not at its option to award; that, and deposition, being specially reserved by the canon (a) to the diocesan. It would be extremely unwilling to do, in the teeth of that canon, what the canon itself seems, in the Court's view of it, expressly framed to exclude it from doing, upon the mere *dicta* of counsel, however respectable, in the absence of any, or, at most, upon the strength

(a) Vide Canons of 1603. Canon cxxii. entitled, "No sentence of deprivation or deposition to be pronounced against a minister but by the bishop."

of one (blind), precedent (*a*). For this, at least then, if for no other reason, the Court declines proceeding to a sentence of deprivation, as prayed by the promovent. And the Court not having, in its own opinion, authority to pronounce this sentence, it is unnecessary, and it might even be improper, for it to suggest, whether the merits of this party's offence exact it. The discretion of diocesans ought not to be fettered by opinions on this head, in this view of the matter purely extra judicial, expressed *here*. It seems also clearly to result from the premises, that suspension, the proper sanction of the Court, ought not to be carried to any such ex-

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(*a*) In support of the Court's right to deprive, it had been urged, among other arguments, by counsel for the promovent, that such was the general impression or understanding of the bar, and the Court was reminded that, on a late occasion, this position had been broadly advanced by counsel\* before a full commission of delegates, without provoking any dissent. A manuscript note of Dr. Harris was also introduced to its notice, which was in these words:—"In 1689 Sir George Oxenden, as dean of the Arches, deprived one Rich," and, in confirmation of that note, it was said to appear from books in the Arches registry, that there *was* a suit depending in the Court of Arches in the year 1689, entitled "Dr. Rich against Gerard and another," presumed the first (plaintiff or appellant) to be *the* Dr. Rich said to have been deprived.

In the course of the hearing the Judge threw out, that, under a *future* similar proceeding, it would be advisable to consider, whether a sentence of deprivation might not be had (as by invoking the diocesan or archbishop, or otherwise) so as to avoid a breach of the canon, which would result, he conceived, from the Court's proceeding to pass it *per se*, in the manner then prayed.

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\* Namely, by Dr. Swaby, in the case of *Watson v. Thorp*, Del. Tr. T. 1811. See 1 Phill. 277.

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tent in point of time, as would render it tantamount to deprivation; for the Court would not be justified to itself in doing that indirectly, which it felt itself precluded from doing, openly and avowedly, by a precise sentence to that effect, in the first instance. The Court is bound too, in duty, and, it may be hoped, is disposed in inclination, to administer justice in mercy; and not to inflict punishment beyond what it deems necessary, first, to correct the individual himself, and, secondly, to produce due effect, in the way of example, upon others. At the same time it is to be remembered, that offences of a grave nature must not be visited too lightly; as dismissing them, when they occur, with comparative impunity, is certainly not to consult best for their future prevention.

Still, however, with the aid of these principles, it is difficult to define the exact quantum of any variable and discretionary penalty, incurred by a particular defendant, under all the circumstances, for any given offence. It is peculiarly so in the present instance, because it fortunately happens that few precedents occur in this kind to guide the discretion of the individual judge. I say "fortunately happens;" it being highly creditable to the body of the clergy that, numerous as it is, there has seldom been occasion to resort to any proceeding of a nature similar to the present. The single instance within my memory (now beginning to extend over no short period) is the case of Dicks and Huddesford, which occurred here in 1794. The Court suspended the defendant in that case, a clergyman articled against for drunkenness and profaneness, for two years; and directed that, at the end of that

period, he should exhibit a certificate from three clergymen in his vicinity, of good behaviour in the interim, prior to the suspension itself being taken off or relaxed; condemning him, at the same time, in costs. Upon looking into that case I find it to have been one of by no means equal enormity with the present. There was much too in the case which went to shew, that the defendant was hardly strictly *sane*—a consideration which might, and probably did, operate in mitigation of punishment, although the fact of derangement, if it were such, did not appear in the cause, in any such shape, or to any such degree, as could render Mr. Huddesford irresponsible for his conduct altogether. Taking that case, in some measure, for a guide, but looking at the greater magnitude, and, I may add, at the deeper malignity of the offences proved against *this* defendant, it appears to me that it would be a shrinking on the part of the Court from a due discharge of that duty imposed on it, in order to preserve the discipline of the church, and for the interests of the public, were its sentence of suspension, in the present case, to be for less than *three* years. The Court therefore, on these several considerations, pronounces the articles proved; decrees a suspension of three years, and a certificate, as in Huddesford's case, of intermediate good behaviour, prior to its relaxation; and condemns Mr. Davies in the costs of this suit (a).

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(a) The sentence was as follows:—

The Judge, by his interlocutory decree, pronounced the articles proved, &c. and "that the said Rev. David Griffiths Davies, clerk, licensed curate of the augmented curacy of the chapel of Ascot, and curate of the parish of Charlbury, both in

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the county and diocese of Oxford, be suspended for the space of three years, to commence from the time of the publication of the said suspension in the parish church of Charlbury aforesaid, from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the word of God, administering the sacraments, and celebrating all other duties and offices in the said chapel and parish church, and elsewhere, within the province of Canterbury, and from all profits and benefits of the said augmented curacy of the chapel of Ascot, and curacy of Charlbury, and from taking and receiving the fruits, tithes, rents, profits, salaries, and other ecclesiastical dues, rights, and emoluments whatsoever, belonging and appertaining to the said curacies; and did suspend the said Rev. David Griffith Davies, clerk, accordingly; and did condemn him in the costs of this suit: and did order and decree that, at the expiration of the said three years, the said Rev. David Griffith Davies, clerk, do and shall exhibit and leave in the registry of this Court, a certificate, under the hands of three clergymen in his vicinity, of his good behaviour and morals during the time of his suspension; and that the said certificate be exhibited to, and approved of by this Court, before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the aforesaid term of three years, until the aforesaid satisfactory certificate shall be exhibited and approved of; and the Judge did direct, that *a copy of this decree, duly certified, be transmitted to the Consistorial Court of the diocese of Oxford, in order that such sequestration or sequestrations may there be issued, or such other steps be taken as the nature of the case, and the exigency of the law, may appear to require; and did also direct the said suspension to be published in the said parish church of Charlbury, on Sunday the 1st day of December next ensuing, or on Sunday the 8th day of the said month, and in the said chapel of Ascot on the said 8th day of December, or on Sunday the 15th day of the said month aforesaid.*"

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3d Session.

**BARLEE v. BARLEE.**

**AT** the sitting of the Court on this day, the Registrar, by direction of the Judge, read aloud the following memorial, addressed to the Judge of the Court:—

Imprisonment for a contempt, nature, effect, and remedy of—not, as often erroneously supposed, either in the discretion, or terminable at the pleasure, of the Ecclesiastical Judge by whom the party is pronounced in contempt.

“ We, the undersigned, think the case of Mrs. Barlee, whose petition is hereunto annexed, deserving of the utmost commiseration, and humbly entreat your Honorable Court to accede, if possible, to the prayer of it.

“ A. H. STEWARD, Sheriff.

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|-----------------|---------------|---------------------------------------------|
| “ C. BERNERS,   | B. G. HEATH,  | } Magistrates<br>of the County of Suffolk.” |
| “ T. METHOLD,   | C. CHEVALIER, |                                             |
| “ P. GODFREY,   | G. CAPPER,    |                                             |
| “ R. PETTIWARD, | J. GIBSON,    |                                             |
| “ J. CHEVALIER, |               |                                             |

The petition referred to in this memorial (also read aloud by the Registrar) was in the following words:—

“ The humble Petition of FRANCES BARLEE.

“ Sheweth,

“ That your petitioner now is, and has been since the 8th of January, 1821, a prisoner in the gaol of Ipswich, for the county of Suffolk, by virtue of a writ, dated May 21st, 1821, issued by Phillip Bennett, Esq. the then high sheriff of the said county, in pursuance of an order of your Honorable Court,

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consequent upon a monition from the same, addressed to your petitioner, the said Frances Sarah Barlee, directing her to return home to her husband, Charles William Barlee, and upon a subsequent decree, declaring your petitioner to be in contempt of Court. Your petitioner humbly states, that it is not in her power to comply with the monition of your Honorable Court, her husband, the said Charles William Barlee, not having, since the year 1815, had any regular house or place of residence, and that she does not at present know where he resides. Your petitioner further begs leave humbly to state, that did she know the residence of the said Charles William Barlee, she could not, consistently with her own safety, return to him, as from his threats and ill usage she considers her life to be in danger, and that she has formerly sworn the peace against him. Your petitioner further states, that a mutual verbal agreement of separation took place between her and the said Charles William Barlee, on the 5th of June, 1815, but that, on the 6th July following, he seized and confined your petitioner in a house in Vine Street, Lambeth; but that, by the interference of the magistrates of Union Hall, she was enabled to appear before them at the said Hall, on the 27th July, 1815, when she there swore the peace against her said husband, who could not then be found. She further states, that she had lived in a state of separation from her said husband for upwards of three years previously to his institution of the suit against her in your Honorable Court; and that she is now detained by virtue of a writ in which she is wrongfully designated by the male appellation of Francis.



" Your petitioner further humbly states, that she was heiress to a considerable property, part of which was, by her marriage-settlement, reserved to her own use; but the trustees nominated in that settlement being all related to, and acting, as she supposes, under the influence of the said Charles William Barlee, have failed to afford that protection to her person and property which she conceives she has a right to demand; she has, therefore, been obliged, under great difficulties from the want of money, to institute certain proceedings against those trustees, which proceedings are now pending in the High Court of Chancery, but your petitioner, by her present incarceration, is disabled from going on with them properly, whereby her estate and interests are materially injured.

" Your petitioner also further begs leave to state, that since her confinement in the gaol at Ipswich, her husband, the said Charles William Barlee, has totally neglected and refused to supply her with food and raiment, and that she is in want of the common necessities of life, being reduced to the gaol allowance of bread and water, and a small portion of cheese. That your petitioner, when first imprisoned, was suffering under a liver complaint, for which she was attended by the late Dr. Girdlestone, of Yarmouth; that since her imprisonment, that complaint has increased, and that, in consequence of the varied temperature, and other inconveniences of the apartment assigned to her, which is uncieled, and open to the roof of the prison, she has had an abscess in her head, and been severely afflicted with rheumatism; and that she has just ground to fear that another winter's imprison-

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ment, under her present privations, would be fatal to her.

“Your petitioner, therefore, humbly prays, that your Honorable Court would be pleased to take into consideration these statements, and graciously to pardon the contempt into which your petitioner has involuntarily and unhappily fallen, and by giving an order for her liberation, afford her the means of saving her life and property. And your petitioner, as in duty bound, shall ever pray, &c.

“F. S. BARLEE.”

Court.—Sir JOHN NICHOLL.

The petition of Mrs. Barlee, which has just been read, together with the recommendation accompanying it from the sheriff and magistrates of Suffolk, gives this Court an opportunity of publicly noticing the case of this unhappy woman, about which some misapprehension *apparently* exists. By this public notice of it, the party herself, and those who take an interest in her behalf, may become informed, that whilst the Court very sincerely commiserates her situation, it is without any power of affording her relief in the manner prayed. Mrs. Barlee is imprisoned for what is termed a contempt. A notion prevails, that a contempt must be some disrespect shewn to the Court, and that the imprisonment is in the discretion, and terminable at the pleasure, of the Judge. This is very erroneous. Contempts are usually incurred by a party's neglect or refusal to do some act which is, in justice, due to the other party in the cause; such as the giving in of answers, the payment of costs, or the like; and the imprisonment which follows is at the prayer of the other party—a prayer to which the Court cannot refuse to

accede, without a breach of its duty, and a denial of justice. By the law of this country, married persons are bound to live together; and if either withdraws without lawful cause, the other may, by suit in the Ecclesiastical Court, compel the party withdrawing to return to cohabitation. The only lawful cause for withdrawing is the cruelty or adultery of the other party; for this Court can take no cognizance of disputes about property or mutual agreements to live separate. To amount to cruelty there must be personal violence, or manifest danger of it; for unkindness and reproachful language on the one side, or vain and unfounded fear on the other, do not constitute any case of cruelty which the law can notice. It need scarcely be added, that it is not sufficient to allege and charge cruelty; it must be judicially established by evidence. Mrs. Barlee withdrew from her husband—he instituted a suit to compel her to return—she pleaded cruelty—time was allowed her to produce her evidence—that time was repeatedly extended—till, at length, no witnesses being produced, the Court was forced, in justice to the husband, to conclude the cause, and to decree Mrs. Barlee to return to her husband. A monition was issued against her to that effect: This monition was not obeyed. The Court was continually pressed, on behalf of the husband, to pronounce Mrs. Barlee in contempt for not obeying the monition. Letters were addressed by this lady to the Judge of the Court, to other Judges, and to various persons, complaining of her husband, of her trustees and relations, and of her law agents; and suggesting that all these were in a conspiracy to

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oppress her, and to rob her of her property. The Judge of this Court of course could neither answer, nor act upon, such letters respecting a matter depending before it; but they exhibited such symptoms of aberration of mind as to induce the Court publicly to throw out a suggestion, on being pressed to pronounce her in contempt, whether her friends could produce any satisfactory evidence of actual derangement; for an insane person cannot be guilty of contempt, so as to be legally responsible. The husband, of course, would have been entitled to controvert the fact. No case of that sort however was brought forward by Mrs. Barlee's friends; and after a considerable lapse of time, and repeated application on behalf of the husband, the Court was at length compelled to pronounce Mrs. Barlee in contempt, and to signify her contempt to the proper temporal jurisdiction. Carrying forbearance to the utmost point, the Court could no longer, without an absolute denial of justice, refuse to take this step on the demand of the husband. Here the authority of this Court ceased—the imprisonment takes place under that of the temporal jurisdiction; nor has this Court the power of releasing at pleasure, but only on the obedience of the party. This Court can no more release in the way prayed, than a Judge at common law can, at pleasure, release a defendant who is imprisoned for non-payment of damages recovered in an action. The imprisonment is here to enforce the legal rights of the husband; and unless the husband will consent to waive his rights, or unless she obeys the monition, or unless it can be shewn that she is not in a fit

state of mind to obey, this Court can take no step (a).

(a) At the sitting of the Court on the next following, the 4th Session, an affidavit of Mr. C. Barlee, the husband of the petitioner Frances Barlee, and a letter addressed to the dean of the Arches by the Rev. Edward Barlee, the brother of Mr. C. Barlee the husband, were read in Court by the registrar, in vindication of the conduct of the husband, and in total denial of nearly all the facts stated in the wife's petition. And on the bye-day, a statement forwarded to the Judge by the high sheriff of Suffolk was also read in Court, in direct contradiction of what the petitioner Mrs. Barlee had asserted relative to her treatment in Ipswich gaol.

The Judge, after reprobating all private communications from suitors respecting matters depending before him, and noticing the irregularities into which any attention paid to these in the first instance naturally led, observed,

The Court has permitted these several documents to be read as an act of justice to the husband, in consequence of the publicity which it has been the means of giving to the wife's (as it should now seem unfounded) complaint. Here, however, these irregularities must stop, there being nothing before the Court upon which it can make any order.

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AUSTEN v. DUGGER.

(*On Motion.*)

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THIS was an appeal from the Consistorial Episcopal Court of Exeter, where the cause originally depended, being a cause of the office of the judge for quarrelling, chiding, or brawling, in the parish church of Fowey, in the county of Corn-

tion of the party to whom they are still due, to issue a new monition for payment of such costs.

If a party committed for non-payment of costs, under an erroneous process, be thereupon released, the Court is bound, at the applica-

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wall, and diocese of Exeter, promoted by Joseph Thomas Austen, Esq. against Richard Dugger, both of the parish of Fowey (a). By the sentence appealed from, dated on the 5th day of June, 1818, Dugger was dismissed from the suit, and Austen was condemned in costs. But on the 8th of May, 1819, the Court of Arches reversed that sentence, and pronounced the articles fully proved; suspended Dugger *ab ingressu ecclesiae* for one week; and condemned him in the costs in both Courts, excepting only such as were occasioned by a certain allegation, exceptive to the character of the defendant's witnesses, given by Austen, the promovent, in the Consistory Court of Exeter.

Those costs were afterwards taxed at the sum of 202*l.* 8*s.* 5*d.*; for payment of which a monition went out, and was returned, duly, and personally, served upon Dugger; and on the 2d Session of Michaelmas Term, 1819, the Court pronounced him in contempt, and directed him to be signified, for not having obeyed the said monition. A *significavit* accordingly issued under seal of the Arches Court, followed by a writ *de contumace capiendo* out of Chancery, pursuant to the statute; under which writ Dugger was taken into custody, and lodged in Bodmin gaol, some time about the latter end of November, or beginning of December, 1819.

In Easter Term, 1822, a rule *nisi* for a habeas corpus to bring up the body of Dugger, in order to his discharge, was granted by the Court of King's Bench, on the ground of a defect in the warrant of commitment. That rule, upon argument, was made

(a) Vide 3 Phill. p. 124.

absolute (a), and Dugger soon after was brought up before a judge, at chambers, and discharged.

The present was an application to the Court for a *new* monition against Dugger for payment of these costs, in order to his re-commitment, under a new warrant, in default of payment. It was sworn that neither the said costs, nor any part of them, had been paid, but that the whole were still due and owing to the said Joseph Thomas Austen.

JUDGMENT.

Sir JOHN NICHOLL.

The facts upon which the present motion is founded partly appear upon the records of this Court; and the rest are regularly stated in, and verified by, affidavits. It appears by these, that the costs in question have been decreed by the Court, and are still due; and the question is, whether the Court, upon this application of the party to whom they are due, can refuse the aid of its process to enforce their payment. Now I am of opinion, that the party applying for, under the circumstances, *is* entitled to that aid; and, consequently, that a new monition must issue. Here has been a former process, and from an error lately discovered in it, that process has become ineffectual. Could this error be fairly ascribed to the party suing it out; or could it be shewn to have occasioned the other party material, or any, inconvenience, a different consideration might possibly apply to the case. But, on the contrary, I incline to hold, that neither the one party is blameably in error, nor the other has sustained any injury. It is true that the Court of King's Bench has held the *significavit* defective, as not stating, with suffi-

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(a) See 5 Barnew. & Ald. p. 791.

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cient certainty, the nature of the cause in which the costs were incurred, so as to *fix* it within the jurisdiction of the Ecclesiastical Court. But that process issued in the ancient and accustomed form; and the description of the cause in the *significavit*, viz. "a certain cause of appeal and complaint of nullity," is literally taken from that in the Court books; so that no blame is justly imputable to the party suing out the process. Had the process, again, been liable to no such objection, Dugger must have still been in Bodmin gaol; whereas, in consequence of its being erroneous, he has been released from prison, and at large since Easter Term last. He, therefore, has suffered no injury by the process going out in its actual form; or if he has, it is an injury for which, in my judgment, he must seek his remedy in another forum. Meantime, the costs being, as I have said, due and unpaid, it seems to me that the Court is bound, *ex debito justitiæ*, to enforce their payment. This Court is not *functus officio* till it has enforced the execution of its decree; nay, even after payment of costs, had the process been regular, the party, Dugger, must have come here for his writ of deliverance; so that this Court could hardly have been styled *functus officio*, in either alternative. I shall therefore allow the monition to go; not, I confess, without some reluctance; as the party against whom it is prayed has been imprisoned upwards of two years, and may be *unable* to pay the costs in question; in which case, if aware of it, the party praying the monition, is chargeable with proceeding upon purely vindictive, and therefore upon unjustifiable, grounds. The fact, however, may be just the reverse; Dugger may have

ample funds, and may merely resist from obstinacy, and to defeat the just claims of the other party. After all the monition is only, in effect, in the nature of a rule to shew cause; for it should be distinctly understood that its issue is by no means conclusive. Upon its return, the party monished may appear, and pray it to be superseded—a prayer to which, upon cause shewn, the Court may be disposed (as I apprehend that it is at *full* liberty) to accede. In this character, and subject to these limitations, I direct the monition to issue as prayed (a).

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(a) The monition so decreed was immediately extracted, and was returned, duly served, on the 1st Session of Hilary Term 1823. On the 2d Session a proctor appeared to the monition on behalf of Dugger, the party monished, but under protest; which he was assigned to extend by the 4th Session. An act on petition was consequently entered into between the several parties, which was brought in, sped, on the 3d Session of Easter Term, when the proctor for the petitioner Austen also brought in two affidavits in support of that part of his act which alleged Dugger's ability to pay the costs in question. On the 4th Session of Easter Term, the Judge over-ruled the protest entered on behalf of Dugger (who did not appear by counsel), and assigned him to appear, absolutely, on the next court-day. On the next court-day, namely, the 1st Session of Trinity Term, 1823, no appearance being given, the Court pronounced Dugger in contempt for not having appeared absolutely to the monition [i. e. the monition last issued], in compliance with its order to that effect; and directed him to be signified pursuant to the statute. A *significavit* was accordingly again extracted, followed soon after by a *new writ de contumace capiendo*, under which Dugger was re-committed to Bodmin gaol.

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BLYTH, formerly SODEN, against BLYTH.

An Appeal from the Consistory Court of London.

(On the Admission of an Allegation.)

An appeal only *suspends* the sentence appealed from, does not render it a nullity. Hence, the statute 3 G. 4. c. 75. (which passed *after* a sentence of the Consistory Court of London pronouncing a marriage null and void by reason of minority and want of consent under 26 G. 2. c. 33, though pending an appeal from that sentence) held, in no degree, to affect the question of such marriage.

THIS, in the first instance, was a suit of nullity of marriage, promoted and brought in the Consistorial Episcopal Court of London by Samuel Blyth, the natural and lawful father of Augustus Frederick Blyth, against Sarah Blyth, otherwise Soden, for the purpose of obtaining a sentence declaratory of the nullity of a marriage had between the said Augustus Frederick Blyth, and the said Sarah Blyth, otherwise Soden, by reason of the said Augustus Frederick Blyth's alleged minority at the time of his said marriage, and of the marriage being had without the consent of his natural and lawful father, the said Samuel Blyth. The marriage was solemnized under a licence, granted on the usual affidavit, stating "*both parties to be of age,*" sworn by the alleged minor.

The cause was heard, in the Court below, on the 4th Session of Trinity Term, in the present year—on which day [the 28th of June] a sentence was pronounced, declaratory of the nullity of the said marriage. From that sentence an appeal was immediately asserted, and was afterwards duly prosecuted to this (the Arches) Court. The usual libel of appeal was brought in and admitted—and was followed by an allegation, tendered on the same be-

half—that of the appellant—the admissibility of which was the question now before the Court.

The allegation consisted of two articles.

The first article pleaded, that, subsequent to the 28th day of June, 1822, being the date of the sentence appealed from, and pending the appeal—to wit, on the 22d day of July, 1822—an act of parliament passed, which (after reciting that great evils and injustice had arisen from certain provisions of 26 Geo. 2. c. 33, rendering all marriages by licence, where either of the parties, not being a widower or a widow, should be under the age of twenty-one years, without the consent of the father of the minor, if living; or, if dead, of the guardian or guardians, lawfully appointed, or one of them; or, in default of a guardian or guardians, lawfully appointed, of the mother, if living and unmarried; or, in default of a mother living and unmarried, then of a guardian or guardians of the minor's person, appointed by the Court of Chancery, null and void—and after repealing the said provisions as with respect to marriages thereafter to be solemnized, further) enacted, in the words following—to wit—“that in all cases of marriage had by licence before the passing of this act, without any such consent as aforesaid, and where the parties shall have continued to live together as husband and wife, till the death of one of them, or till the passing of this act; or shall only have discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage; such marriage, if not *otherwise* invalid, shall be deemed to be good and valid to all intents and purposes whatsoever.”

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The second article of the allegation pleaded, that "the said Augustus Frederick Blyth, and Sarah Blyth his wife, continued together as husband and wife, until the commencement of the suit in this cause in the Court below—and only discontinued their cohabitation during the pending of the proceedings touching the validity of the marriage of the said Augustus Frederick Blyth and Sarah Blyth, formerly Soden, and in consequence of such proceedings."

JUDGMENT.

Sir JOHN NICHOLL.

This is an appeal from a sentence of the Consistory Court of London, pronouncing and declaring a marriage had between Augustus Frederick Blyth, son of Samuel Blyth, the respondent, and Sarah Blyth, otherwise Soden, the appellant, in this Court, null and void, under the provisions of 26 Geo. 2. c. 33, the *old* marriage act. The appeal has been duly prosecuted, and the usual libel of appeal is now followed up by an allegation on behalf of the appellant, the admissibility of which is the point at issue.

The allegation pleads, first, the existing law supposed to be applicable to this case of appeal; and, secondly, the facts requisite to bring it within the operation of that law. But how the law pleaded can be applicable to this case, and, consequently, how the facts can be relevant, I am still to be informed. If the act in question had passed pending proceedings in the Court below, and prior to a sentence pronouncing the marriage invalid, both the applicability of the law, and the relevancy of the facts stated in the plea, would be obvious. But

passing, as it did, after a sentence pronouncing the marriage *invalid*, the one should *seem* to be inapplicable, and the other irrelevant. For the very next following (the third) section of the act referred to, and in part recited, *specially* provides, that "nothing contained in it shall extend, or be construed to extend, to render valid any marriage declared invalid by any Court of competent jurisdiction *before* the passing of the act." It should *seem* consequently that this marriage can derive no aid from "any thing contained" in the new Marriage Act—in which case the present plea, as being purely superfluous, must of course be inadmissible.

If, however, the sentence annulling this marriage be itself a mere nullity, as contended, *by reason of the appeal*, the marriage, I admit, is valid under the new act, notwithstanding *such* prior sentence of invalidity—is valid, that is, provided the parties were cohabiting up to the commencement of this suit in the Court below, as alleged, and which I am bound to presume that they actually were, for the purpose of deciding upon the admissibility of the present plea.

The real question, then, before the Court is, simply, as to the legal effect of an appeal in this particular—in other words, whether it hath, or hath not, the effect ascribed to it, of rendering the sentence appealed from a *mere* nullity. If it hath, the present plea is highly relevant, and clearly admissible—if it hath not, it can have no bearing whatever upon the case, and must, as clearly, be rejected.

Now that such, an appeal entered, *is* its legal effect, is a doctrine to which I can by no means sub-

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scribe. It is quite at variance with, and contradictory of, my preconceived notions upon this head, on which, I confess, that no change has been wrought by the arguments of the appellant's counsel. On the contrary, I still hold its legal effect to be a mere *suspension*, and not the annihilation, of the sentence appealed from. That this is the correct view of the subject is evident from *these* considerations—the sentence appealed from, if affirmed, that is, if it stands at all, stands as the sentence of the *Court* appealed from, not the appellate Court—the cause is remitted to the Court below ; it is by the authority of that Court that the execution of the sentence is to be enforced ; and it remains valid from the day upon which it was pronounced by the Court appealed from, and not from that upon which it was merely affirmed by the appellate Court. In a word, the sentence, on appeal, is dormant only, not extinct—and revives, on affirmance, with every consequence attached to it, which would have attached had no appeal been interposed.

The authority adduced in support of the novel position, that an appeal is not merely “*suspensio*” or “*recessio*,” as it is termed by the civilians *primæ latae sententiæ*, but that it actually annuls it, is not more convincing to my mind than the argument ; or, indeed, I should rather say, it assists in refuting it. It occurs in Ayliffe (*a*), who defines an appeal to be “a judicial right, whereby the former sentence is *for a while* extinguished.” Now the “*temporary extinction*” of a sentence is, to my apprehension, the same thing with its “*suspension* ;”

(a) Ayliffe's Par. 71.

it is only another mode of expressing the self same idea (a).

Entertaining these notions, for reasons already suggested, I reject this allegation. The appeal of course may proceed, notwithstanding its rejection. If, in the event, it should prove, that the Court below has taken an erroneous view, either of the facts of this case as they appear in evidence, or of the application to those facts of the *then* existing law, it will be the duty of this Court to reverse its sentence: otherwise, that sentence must be affirmed; for the appellant can derive no aid from "any thing contained" in the new Marriage Act, the retrospective clause in which I am of opinion in no degree affects the marriage in question in this suit.

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Allegation rejected.

(a) This whole matter is well summed up by Gail, who says, "that an appeal extinguishes the sentence *quoad præsentem causæ statum*—but that *quoad futurum statum, et litis exitum*, it only suspends it." Vide Gail Prac. Obs. l. 1. Obs. cxliv. n. 1.

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SCHULTES v. HODGSON.

(On the Admission of Additional Articles.)

Additional articles may be admitted in criminal suits, though not universally, or as a matter of course—in what cases—under what restrictions—and subject to what limitations.

THIS was a cause of office, originally depending in the Consistorial Episcopal Court of Sarum, the nature and circumstances of which have been stated in a former part of these Reports (*a*). The present question arose upon the admissibility of *additional* articles tendered on the part of the promovent, in consequence of the proctor for the defendant refusing to consent to a reform of the original articles (given in and admitted in the Consistory Court of Sarum) *out of Court*—as suggested by this Court, (the Court of Arches), where the principal cause has been retained, at the hearing of the appeal.

JUDGMENT.

Sir JOHN NICHOLL.

When this appeal was before the Court on a former occasion, it suggested to the parties the propriety of amending the articles, by consent, *out of Court*, if irregular and defective, as urged by the appellant (the defendant in the original suit), in their then subsisting shape. This it did, as being of opinion that the appellant had forfeited his right to be heard *in Court*, in objection to articles, from the admission of by the Court below he had not appealed *within* the time prescribed by law; and to which, moreover, of course *subsequent* to their ad-

(*a*) Vide page 105, of this volume, ante.

mission, he had given a negative issue. The Court, in recommending this measure, had the interests of two parties in view—of the promovent, or rather the public, which is manifestly interested in the correction and suppression of offences of the nature of those charged upon the defendant; and of the defendant himself, who had complained, and not without reason, of being placed under a disadvantage with respect to his defence, from the vagueness, and want of specification, of the articles, both as to time and place. I am to remember, that I have still the interests of the same *two* parties to look to, in considering the admissibility of these additional articles. For it seems, that a refusal on the part of the defendant to consent to a reform of the original articles, as suggested by the Court (in which possibly he might be right, having merely his *own* interests to protect), has constrained the promovent to offer those additional articles, which the Court is now prayed, on behalf of the defendant, to reject.

The admissibility of these articles has been attacked, generally, if I understand, upon the broad principle of additional articles being, universally, inadmissible in criminal suits. I am aware, however, of no such rule as this, urged in argument by the counsel for the appellant; and indeed, in *Stone's case* (a), which has been referred to by the counsel for the respondent, additional articles were

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(a) This was a proceeding by articles, against the Reverend Francis Stone, rector of Norton, otherwise Cold Norton, in the county of Essex, and diocese of London, in the Consistorial Episcopal Court of London, for advisedly maintaining or affirming doctrine directly contrary or repugnant to the Articles of religion, as by law established, or some, or one of them; and

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actually admitted in a criminal suit, not indeed by this Court, but by the Consistory Court of London, under the able presidency, at that time, of the present Lord Stowell. I am of opinion, therefore, that additional articles *may* be offered, even in criminal suits. At the same time, they are not admissible as a matter of course, or indeed at all, without special ground for their admission—such, for instance, as this suit presents, in the circumstance of the articles having been admitted, in the first instance, most hastily and unadvisedly, in a Court not, it may be conjectured, much in the habit of dealing with cases

against the statute 13 Eliz. c. 12, intituled, “An act for the ministers of the Church to be of sound religion.”

The articles in this case were brought in on the 3d Session of Trinity Term, 1807, and were admitted, without opposition, on the 4th Session. On the 1st Session of Michaelmas Term following, an additional article was brought in, for the purpose of exhibiting in supply of proof of the 8th, 9th, 10th, 11th, 12th, and 13th of the original articles, a letter from the defendant to a Mr. Stanes, a bookseller at Chelmsford, pleaded to be of the defendant's hand-writing, and to have been sent from the defendant to Stanes, with some printed copies of a sermon imputed to the defendant in those articles, and charged as containing the offensive matter proceeded against, such letter plainly inferring Mr. Stone to have been the author of that sermon.

The admission of this additional article being opposed by counsel for the defendant, the Court directed it to be reformed; but on the 4th Session of Michaelmas Term, 1807, it was admitted, as reformed, together with its exhibit, without further opposition.

In the event, the articles were pronounced to be proved, and Mr. Stone was deprived; the Bishop (Porteus) in person passing sentence, conformably to the 122d canon. See p. 296, ante.

of this description. And even where admissible at all, additional articles must be such as to occasion, taken in conjunction with the original articles, no substantial breach of the rules of criminal pleading, in order to make good their claim to be actually admitted.

Now, it is matter of perfect notoriety, that in proceedings by articles, the articles must be brought in on the Court-day immediately subsequent to that on which the defendant has appeared; and that, being so brought in, they must contain the charge, and the whole charge. It is true, that the articles, when brought in, may be reformed and amended under the direction of the Court, prior to their actual admission; but when they are once admitted, and issue is joined, either party, I apprehend, is bound by them. In particular, the promovent is not at liberty to drop in with charges, one after another—with perhaps the single exception, that offences *ejusdem generis*, subsequently committed, may be pleaded in subsequent articles. But further articles, as matter of course, containing new criminal charges, or even advancing collateral facts and circumstances in proof of such articles of the original set as are, in themselves and directly, criminatory, ought not to be admitted. And now, to apply these principles to the question immediately before the Court:—

The 5th, 6th, and 7th articles of the original set contained, in substance, the whole criminal charge. The first of these, the 5th, charges and objects, that the defendant, being a clerk in holy orders, a priest, and vicar of Hagborn, “*within eight calendar months from the commencement of this suit, (that*

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is to say) in the months of March, April, May, June, July, August, and September, last past, and in this present month of October, 1821 (being the month and year in which the original articles were brought in), committed the foul crime of adultery, fornication, or incontinency, with Rachael Harris; and that for all, some, one or more, of the months aforesaid, he, the said defendant, had lived and cohabited with the said Rachael Harris, in one and the same house, in a lewd and incontinent manner." The 6th, in like manner, charges and objects, that "during all and singular the several months in the years of our Lord 1819, 1820, and this present 1821, he, the said defendant, oftentimes committed the said foul crime with the said Rachael Harris; and that for all, some, one or more, of the months in the said several years, had lived and cohabited with the said Rachael Harris, in the said lewd and incontinent manner." The 7th objects, that "in consequence of such intercourse, the said Rachael Harris had twice, or at least once, within the months and years specified in the last article, conceived or been with child by the defendant, and had been delivered of two children, or at least of one child, within the parish of Hagborn, or some other parish or parishes; and that such two children, or at least one child, so begotten and born, are, or is, now living within the said parish of Hagborn." These are the substantial criminal charges upon which issue was joined—and I am of opinion, that such of the articles now brought in as contain other charges accumulative upon these, or even adduce collateral facts and circumstances, in corroboration of these charges themselves, so contained in the three origi-

nal articles just specified, could, under no circumstances, be admitted. Such, however, of the additional articles as are in neither of these predicaments, I propose to admit, under the special circumstances of this appeal—the substantial justice of the case as between plaintiff and defendant, at the same time, suggesting, and even appearing to require it.

Now, the two first additional articles *are* in neither of these predicaments. They merely plead two exhibits, in proof of the defendant's institution and induction to the vicarage of Hagborn, in supply of proof of the first original article, which simply charged, that the defendant was, and for some time past had been, vicar of Hagborn. These articles, with the annexed exhibits, I accordingly admit. The exhibits themselves, too, being merely copies of, first, the act, or minute of institution, and, secondly, the mandate of induction, might possibly even have been brought in annexed to a deposition, without being specifically pleaded at all.

But the 3d, 4th, 5th, and 7th additional articles, where they are not mere repleaders, either go into new matter of an *earlier* date, or object collateral facts and circumstances corroborative, and inferring the truth, of parts of the original articles directly criminatory. For instance, the 4th, with reference to the 7th original article, (which itself refers back to the 6th) articles and objects, that in consequence of the defendant's criminal conversation with Rachael Harris therein objected, "she, the said Rachael Harris, was, *in the month of December, in the year of our Lord 1816*, delivered of a

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female bastard child, in the house of the said defendant, situate at Hagborn, &c.” And it has been contended, that the promovent is not precluded from a greater specification as to the two bastard children mentioned in the 7th original article, even though it may shew a criminal connexion *earlier* than that which is there laid. I entertain, upon this head, a different opinion. It appears to me that *this* is matter which, if chargeable at all, should have been charged in the original articles; and that the defendant is not bound to answer to it, in this stage of the cause. This is not that specification, the want of which in the original articles was objected by the defendant, and to supply which (he, the defendant, having refused his consent to their reform out of Court), is the promovent’s *ostensible* motive for tendering *additional* articles. So, again, the application of the overseers of Hagborn to the magistrates, relative to the affiliation of these said bastard children—their appointment of a day for Rachael Harris, the mother, to attend, in order to being examined touching the same—her refusal, *at the defendant’s suggestion*, to attend—her being consequently brought before a magistrate, on a summons—her refusal, still at the defendant’s suggestion, to be examined—her consequent commitment for twelve months to Abingdon gaol—the defendant visiting her, and supplying her with money and provisions, whilst she remained in the said gaol, and suffering her to return to his house upon the day of her discharge from the same—all pleaded in the 7th additional article—are not a mere reduction of the original, through the medium

of this additional article, into a less vague and more specific shape; but are a series of collateral facts, inferring the truth of matters directly criminal charged upon the defendant in the original articles; and consequently, in my judgment, for reasons to which I have already adverted, are not admissible in this stage of the cause. The 3d, 4th, 5th, and 7th additional articles must, I think, be rejected.

The 6th and 8th articles exhibit—the former, two original letters from the defendant himself, in relation to the facts pleaded, addressed to the Deputy Register of the Consistory Court of the Lord Bishop of Sarum—the latter, an original letter from the same defendant to his alleged paramour, Harris, whilst in Abingdon gaol. They are pleaded in supply of proof of the premises charged against the defendant, in the 3d and 4th, and 7th additional articles, respectively. These articles, I think, may stand, after being reformed, by making them refer to the 7th and 8th original articles, instead of to the additional articles now rejected. The letters themselves are rather equivocal; but however, *valent quantum*. Their introduction in this stage of the cause may, for reasons suggested in the course of this judgment, be a little irregular; at the same time it is conformable to the precedent in Stone's case; and some latitude in pleading, with respect to exhibits, is allowable, as is well known, in all suits.

Upon the whole, then, I admit the 1st and 2d additional articles, together with the 6th and 8th, after being reformed as suggested, and reject the

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remainder; with the exception of the 9th, which is the usual concluding article, and admissible of course.

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Articles admitted as reformed (a).

(a) In which stage of this proceeding it soon after finally determined by the death of the defendant.

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NORTHEY v. COCK.

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(On Motion.)  
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Administra-  
tions pending  
suit, never  
granted, on  
motion, but  
by consent.  
The principles  
by which the  
Court is go-  
verned in  
granting ad-  
ministrations  
pending suit.

**T**HIS was an appeal from the Consistory Court of Exeter, promoted and brought by Emanuel Northey, of the parish of Stoke Damerel, in the county of Devon, and diocese of Exeter, against Richard Cock, of the parish of Liffen, in the same county, and diocese. It was described, originally, as "a cause of bringing into and leaving in the registry of that Court, the letters of administration of all and singular the goods, chattels, and credits of Mary Row, late of Broadwoodwiger, in the county of Devon, widow, deceased, thentofore obtained by Richard Cock, the pretended cousin-german and next of kin of the deceased, and of shewing cause why the same should not be revoked and declared null and void—and why such letters of administration should not be committed and granted to Emanuel Northey, the lawful cousin-german, *once removed*, and one of the next of kin of the deceased."



This cause was appealed, upon a grievance ; on the Judge below having ordered, or decreed, the *answers* of the said Richard Cock, to an allegation given and admitted, propounding the interest of the said Emanuel Northey, which had been denied by the said Richard Cock, to be full and sufficient answers to the said allegation.

The libel of appeal was admitted on the 1st Session of Trinity Term ; and on the bye-day after that Term (the respondent's proctor having given an affirmative issue to that libel, and confessed the appeal), the Judge pronounced for the appeal, and retained the principal cause—and therein decreed the said Richard Cock's answers to be insufficient, and assigned him to give in further and fuller answers on the 1st Session of the next Term.

On the 1st Session of Michaelmas Term, the proctor for the respondent exhibited a proxy under the hand and seal of his party ; and, by virtue thereof, admitted the appellant to be the cousin-german, once removed, but denied him to be a next of kin of the deceased.

On the 3d Session, the respondent's proctor propounded the interest of his party, and asserted an allegation—at the same time the proctor for the appellant exhibited the affidavit of a Mr. Edward Abbot, and moved the Court, after reference had to the contents of the affidavit, to grant administration to him (pending suit) of the effects of the party deceased in the cause.

The party upon whose affidavit this motion was founded, in substance, deposed, *that* Mary Row, the party deceased, died on or about the 1st day of June, 1820, intestate—that Richard Cock, one

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of the parties in the cause, who then resided in a house near the deceased's, immediately thereupon took possession of the same, and of cash to the amount of 285*l.* or thereabouts; and in a few days after, and before Emanuel Northey, the other party in the cause, and claiming to be of kin to the deceased in a *nearer* degree, could be apprized thereof in time to enter a caveat, obtained letters of administration of the goods of the deceased, as *next* of kin of the deceased, from the Consistorial Episcopal Court of Exeter, and in virtue of such administration, sold or disposed of a leasehold estate of the deceased, and attempted to sell or dispose of other leasehold estates; and by such and other means, possessed himself of property of the deceased, to the amount of 800*l.* or thereabouts. The appearer, after referring to the proceedings had in the Consistory Court of Exeter, and in this (the Appeal) Court, went on further to depose, *that* the estate of the said deceased consisted of leasehold and freehold property, money out on mortgage, bills, and other securities, the rents and interest of which could not be received, as well as of the money of which the said Richard Cock had so as aforesaid possessed himself, and still retained; and that, to the appearer's belief, the property would be deteriorated, and its security endangered, unless administration was granted thereof, pending suit. The appearer lastly deposed, that he was no otherwise interested in the event of the suit, or with the parties, than as having married the sister of the said Emanuel Northey, and that he was ready to take upon himself the office of administrator, and to give any security required by the Court.

JUDGMENT.—SIR JOHN NICHOLL.

This application is irregular in every respect. It is an application for an administration pending suit, *ex parte*, founded upon an affidavit of the proposed administrator, brought in on the 3d (the preceding) Session. Now an administration pending suit is never granted upon motion, unless by consent. If the parties are agreed, both that an administration is necessary, and who the administrator shall be, it may be granted on motion. In any other case, an act on petition must be gone into—the necessity for an administration, pending suit, must be shewn—and the Court must be satisfied as to the fitness of the proposed administrator—or must be placed in a condition to determine between the two, (its most usual office upon such occasions) an administrator, that is, being proposed by each party.

The affidavit exhibited in this case, certainly states, that “the property will be deteriorated, and its security endangered, unless an administration thereof, pending suit, is granted.” But this may be denied and disputed by the other party, if an opportunity be furnished him of so doing—and again, the indifferency of the proposed administrator, the point to which the Court principally looks, is put out of dispute, even upon that person’s own shewing. For he deposes, that “he is no *otherwise* interested in the event of the suit, or with the parties, than as having married the said Emanuel Northey’s sister.” But in proving himself to be *one* of the deceased’s next of kin, Northey must prove his sister to be another—and her husband, substantially, has her interest. Lu-

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 COCK.

stead, therefore, of being an indifferent, he is an interested party—a party interested to an equal extent, at least so far as personalty is concerned, with Northey himself.

I have looked into the cases determined by my predecessor, and find that this Court hath been constantly in the habit of refusing to grant administrations, pending suit, merely to take property out of the hands of a litigant party in the actual possession of it. It hath always required it to be shewn, that the property was in jeopardy—that the party sought to be dispossessed was irresponsible, and refused, or neglected, to furnish adequate and reasonable security. On the other hand, it hath as constantly declined *putting* a litigant party in possession of the property, by granting administration pending suit to *him*, always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties. I reject the present application upon both these principles. Cock, the party sought to be dispossessed, is not merely in the actual, but is also in the legal possession of the effects; for it is stated to be under an administration, although that administration has since been called in; nor is there any proof before the Court (however the fact may be, as to which I determine nothing), that the security of the property is endangered by its continuing in his hands. And Mr. Abbot, the proposed administrator, as already observed, is, upon his own shewing, equally interested, and consequently, in this respect, is *identified*, with Northey himself, the other party in the cause.

Motion rejected,

1822.

Michaelmas

Term.

1st Session.

## PREROGATIVE COURT OF CANTERBURY.

LAWRENCE, Attorney of THOMAS, v. MAUD  
and PICKWELL.

(On the Admission of an Allegation.)

**T**HIS was a cause of interest, between Frances Mary Thomas, wife of Philip Thomas, asserting herself to be the cousin-german once removed, and only surviving next of kin, and Mary Maud, wife of John Maud, and Sarah Pickwell, widow, asserting themselves to be the second cousins, and only surviving next of kin, of Elizabeth Harrison, late of the parish of St. Mary, in the town and county of Kingston-upon-Hull, spinster, the party deceased in the cause, who died, on the 26th of November, 1818, intestate, and, as admitted on all hands, without father or mother, brother or sister, uncle or aunt, nephew, niece, or cousin-german.

In causes of interest, both cases being disclosed, it is advisable that each party should admit so much of the other's case as he may (the whole, if he may) consistently with, and without prejudice to, his own case.—Illustration of this rule.

The interests of the several parties were propounded, respectively, in two allegations.

On the part of Mrs. Thomas, it was, in substance, alleged,—that Thomas Harrison, the deceased's paternal grandfather, had, by his *second* wife, Elizabeth Dennison, two sons, Joseph and Peter—that Joseph, the elder, married Eleanor Ridgway, by whom he was the father of Elizabeth Harrison, the party deceased—that Peter, the younger, married

1822.  
Michaelmas  
Term.

LAWRENCE  
v.  
MAUD.

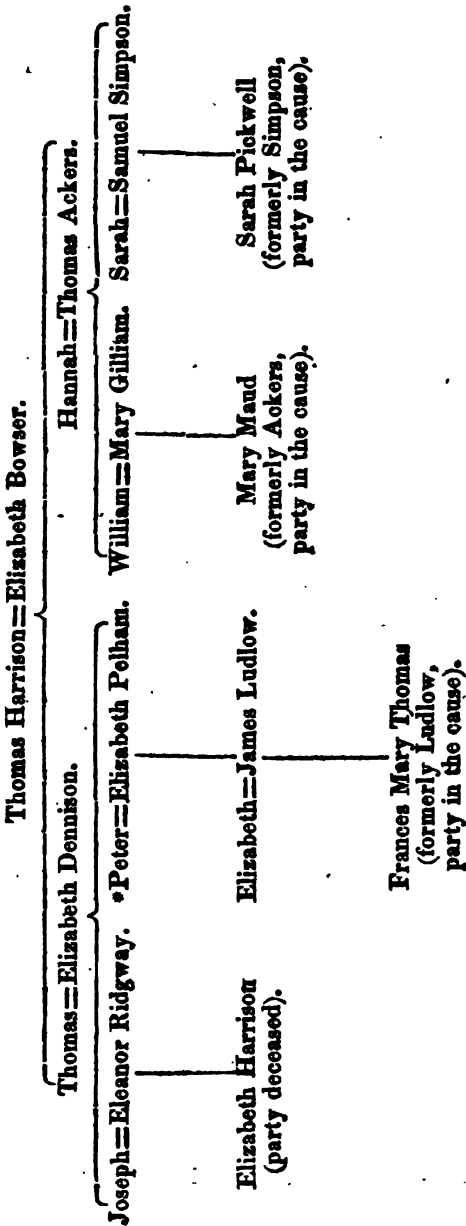
Elizabeth Pelham—*that* the issue of that marriage was a daughter, Elizabeth, married to James Ludlow—and *that* Frances Mary Thomas, party in the cause, was the sole surviving issue of James and Elizabeth Ludlow, and consequently was the deceased's cousin-german once removed, and only next of kin.

On the part of Maud and Pickwell, it was also, in substance, alleged as above, with this distinction—that Peter (brother of Joseph, father of the deceased Elizabeth) Harrison, was alleged, on the part of Maud and Pickwell, to have died, *unmarried*, and consequently without lawful issue. The posterity of Thomas Harrison and Elizabeth (Dennison), the deceased's paternal grandfather and grandmother, being extinct by this event, it became necessary to recur a step higher, namely, to Thomas Harrison and Elizabeth (Bowser), paternal great grandfather and great grandmother of the deceased. The pedigree of Maud and Pickwell was then deduced as follows. It was alleged, *that* Thomas Harrison, the deceased's paternal great grandfather, left, by his wife Elizabeth (Bowser), a son, Thomas, the deceased's grandfather, *and also* a daughter, *Hannah—that* this daughter, Hannah, intermarried with Edward Aekers—*that* the issue of this marriage was a son, William, and a daughter, Sarah—that the son, William, intermarried with Mary Gilliam, by whom he became the father of Mary Maud; and that the daughter, Sarah, intermarried with Samuel Simpson, by whom she became the mother of Sarah Pickwell, parties in the cause. Consequently, *upon this shewing*, Maud and Pickwell

were second cousins, and next of kin of Elizabeth Harrison, the party deceased in the cause (a).

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*Michaelsmas*  
*Term.*  
~  
LAWRENCE  
v.  
MAUD.

(a) The PEDIGREES of the several parties, set out in brief, appear as follows:—



\* It is evident that the sole point in dispute was the marriage of this Peter Harrison, alleged on the part of Maud and Pickwell to have died a bachelor—in which case Elizabeth, mother of Mrs. Thomas, if the daughter at all, could only be a natural daughter of Peter Harrison.

1822.  
Michaelmas  
Term.  
LAWRENCE  
v.  
MAUD.

In several of the latter articles of the allegation propounding the interest of Mrs. Thomas, extracts were made from certain letters and other documents, such letters and other documents being pleaded to be "in the hands of persons, who would produce the same upon their respective examinations, as witnesses in the cause." It was objected—that these letters, &c. *themselves*, should be set forth, in order to enable the other parties to form a correct idea of the true import of the extracts made from them—and, *that* the originals should be brought into the registry, for inspection, prior to the hearing of the cause.

The Court—Sir JOHN NICHOLL,

After sustaining this objection, and directing the allegation to be reformed accordingly, proceeded as follows :—

Now that the cases, on both sides, are disclosed, may not the inquiry, let me ask, be reduced within a very narrow compass? In a considerable part, the case on each side is the same. Both parties allege, *that* the deceased, Elizabeth Harrison, was the grand-daughter of Thomas Harrison, and his second wife, Elizabeth Dennison—that she was the daughter of Joseph Harrison, and Eleanor his wife, formerly Ridgway—that she had a brother, Richard Acklom Harrison, who died in 1813, unmarried. Upon this branch of the pedigree, therefore, there is no controversy—it is common to both parties—and no evidence is necessary on either side; for the Crown has not thought fit to intervene in this suit.

It is also agreed, that the grandfather, besides the son Joseph, had two daughters, Elizabeth and



Hannah, who are also agreed to have died without issue—and further, that he had a fourth child, a son, *Peter*. That fact is alleged by both parties; and it is upon this son, Peter, that the whole case turns. On the part of Maud and Pickwell, it is alleged, *that* this son, Peter, also died without issue. Mrs. Thomas alleges, that Peter married Elizabeth Pelham, and was her grandfather; that they had four children—Thomas, who died unmarried—Hermione, who married a person named Cargy, but left no children—Isabella, who died young—and Elizabeth, who married James Ludlow; and that she (Thomas) is the daughter, and only surviving child, of that marriage.

Now, if this case set up by Mrs. Thomas is proved, there is an end at once of the other case; for Mrs. Thomas is descended from the same grandfather with the deceased, and she and the deceased are cousins-german once removed. Maud and Pickwell only allege their descent from the same great grandfather, that is, only allege themselves to be *second* cousins, a degree more remote, and consequently excluded. Why, then, should both cases go on? or, in other words, why should not the *present* proceedings be confined to proving the marriage of, and descent of Mrs. Thomas from, Peter Harrison. If Mrs. Thomas proves that (and her case, I may say, is exceedingly strong, *as it stands in plea*), Maud and Pickwell can have no claim, and will be *liable* moreover to the costs occasioned by their opposition to the claim of Mrs. Thomas. If Mrs. Thomas fails to prove it, there is an end of *her* interest. She can have no concern with the case of Maud and Pickwell. She may leave that

1822.  
Michaelmas  
Term.  
LAWRENCE  
v.  
MAUD.

1822.  
*Michaelmas*  
*Term.*

LAWRENCE  
v.  
MAUD.

question to be controverted by the Crown, if the officers of the Crown see any sufficient ground to interfere. But if Mrs. Thomas goes on to controvert the other interest—even in the event of substantiating her own *superior* interest—she forfeits all claim to be reimbursed, and can have no pretence whatever even to apply for her costs. Under these circumstances, is it not manifestly the interest of both parties that the case should be limited by an act of Court, to be settled by counsel on both sides, to that part of it which is the true and sole point of controversy, namely, whether Mrs. Frances Mary Thomas is, or is not, the lawful granddaughter of Peter, younger son of Thomas and Elizabeth Harrison, the paternal grandfather and grandmother of Elizabeth Harrison, the party deceased in the cause? Recommending this measure (and a similar one, *mutatis mutandis*, in every case similarly circumstanced), for the present I dismiss these allegations.

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### CHASE v. YONGE.

(*On Motion.*)

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1822.  
*Michaelmas*  
*Term.*  
2d Session.

*Quære*, whether any chancellor, commissary, official, or the like, can be permitted to put the executor, or one entitled to administration of the effects, of a party dying within his diocese, &c. upon proof, other than by oath in his own court, of such party having left *bona notabilia* in divers dioceses, sufficient to found the jurisdiction of the Prerogative Court, before requiring probate, or administration, in the Prerogative Court.

**T**HIS was a business of proving, in common form, the last will and testament of James Chase, late of the city of Norwich, deceased. A caveat, which

permitted to put the executor, or one entitled to administration of the effects, of a party dying within his diocese, &c. upon proof, other than by oath in his own court, of such party having left *bona notabilia* in divers dioceses, sufficient to found the jurisdiction of the Prerogative Court, before requiring probate, or administration, in the Prerogative Court.

was found to have been entered against the same being proved, had been duly warned; and the Court, in the 1st Session of the Term, had decreed probate to the executor, unless the proctor who entered the caveat was prepared, as upon this day, the 2d Session, to set forth *precisely* his client's *interest*.

1822.  
Michaelmas  
Term.  
CHASE  
v.  
YONGE.

On the proctor for the executor *now* praying the Court to direct the probate to issue, the adverse proctor alleged, that "he appeared for the Worshipful and Reverend William Johnson Yonge, clerk, Master of Arts, official in and throughout the whole archdeaconry of Norwich, and denied the jurisdiction of the Court."

The Court—Sir JOHN NICHOLL.

This is a perfectly novel attempt. Is the official (*quasi* such *merely*) at liberty to *appear*, and deny the jurisdiction of this Court? I am very much inclined to doubt it. His "*interest*" I collect to be that accruing from his right to have the will proved in his jurisdiction, if there be no "*bona notabilia*:" but that this entitles him to put the executor, otherwise than by oath in his own Court (a),

(a) Vide Canons of 1603, Canon 92, intituled, "None to be cited into divers courts for probate of the same will," which enjoins, that "if any person *cited*, or voluntarily appearing, before any chancellor, commissary, official, or other exercising ecclesiastical jurisdiction, touching the probate of any will, or the administration of any goods, shall, upon his oath, affirm, that he knoweth, or firmly believeth, that the party deceased, whose testament or goods depend in question, had, at the time of his or her death, any goods, or good debts, in any other diocese or dioceses, or peculiar jurisdiction within the province, than in that wherein the said party died, amounting to the value of 5*l*,

1822.  
Michaelmas  
Term.

CHASE  
v.  
YONGE.

on proof of there being *bona notabilia*, before the will can be proved here, is what I much question. If every inferior ordinary be really at liberty to enter an appearance, and obstruct the grant of a probate or administration, whenever he thinks fit, till the question of *bona notabilia*, raised by himself, be first determined, the inconvenience to the public, in the points of vexation, expence, and delay, may be incalculable.

Let the appearance be taken *de bene esse* only, and the matter stand over till the next Session. If the official should *elect* (on being *permitted*) to proceed in this matter, he does it, I will say, at the imminent peril of costs—provided the executor, that is, should succeed in founding the jurisdiction of this Court. But the sufficiency of the official's interest to raise a question about the jurisdiction of this Court, in the present shape at least, is a point as to which I am by no means satisfied.

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On the next Court-day, the proctor for the official alleged the caveat entered by him to have been withdrawn; and the Judge, at the petition of the proctor for the executor, directed the probate to pass the seal to his party, and condemned the official in *costs*.

then shall such chancellor, commissary, or other, presently dismiss him; not presuming to intermeddle with the probate of the said will, or to grant administration of the said goods—but shall openly and plainly declare and profess, that the said cause belongeth to the prerogative of the archbishop of the province; willing and admonishing the party to prove the said will, or require administration of the said goods, in the court of the said prerogative," &c.

WILKINSON v. DALTON.

1822.  
Michaelmas  
Term.  
2d Session.

**I**N this case, a proctor applied to be permitted to examine a witness (who had been repeated, and dismissed), upon *one* article of the allegation, which she had not been designed to (said, through mere inadvertence) at the time of her production.

COURT—

Has publication passed?

It was replied, by the adverse proctor, in the negative; but he stated, that the witness in question had been repeated, in January, 1821, nearly two years back—and that, in this interval, several allegations had been admitted in the cause, by which the character and complexion of the cause itself had materially changed.

COURT—

Under these circumstances, I shall certainly not permit this witness to be examined as prayed—at all events, not without affidavits to explain both how the witness came not to be designed to this article of the allegation, *originally*, and the necessity for her being examined upon it, *now*. This is one of those applications which the Court listens to with great jealousy. A precedent of the kind, if established, might be abused to obvious ill purposes.

Application rejected.

A witness who had been repeated and dismissed two years before, not permitted, under the circumstances, to be examined, at the end of that time, upon an article of the plea which she had not been designed to at the time of her production as a witness; and which, consequently, she had not been examined upon in the first instance.

1822.  
*Michaelmas*  
*Term.*  
 3d Session.

In the Goods of SIDY HAMET BENAMOR  
 BEGGIA, deceased.

(*On Motion.*)

Administra-  
 tion of the  
 goods of a  
 public func-  
 tionary of the  
 Emperor of  
 Morocco, de-  
 creed to a par-  
 ty *specifically*  
 empowered to  
 take it on be-  
 half of the  
 Emperor of  
 Morocco—on  
 proof exhibit-  
 ed to the Court  
 of the said Em-  
 peror's title  
 (not question-  
 ed by the  
 Crown, or  
 otherwise) to  
 the deceased's  
 effects, in be-  
 half of the na-  
 tional tres-  
 sury, by the  
 Mahomedan  
 law.

**SIDY** Hamet Benamor Beggia, late consul of His Majesty the Emperor of Morocco, at Gibraltar, died there, in the year 1821, intestate. The deceased was a native of Larache, in Fez, and consequently a natural-born subject of that Emperor. He died a bachelor, without father, mother, brothers, sons, daughters, uncles, aunts, sons of the aunts (*by the father*), or any other *proper* heir, by the Mahomedan law, leaving effects at Gibraltar, and in this country, to which the Emperor Muley Soliman became, under the circumstances, entitled, by the Mahomedan law, in behalf of the national treasury.

These facts being authenticated to the Courts of Tangier, and Rabal, and decrees, founded upon them, having issued from those Courts, declaratory of the law as above, the Emperor Muley Soliman commissioned two of his subjects (Haggi Thaer Al Hial Rebati, and Haggi L'Arbi Mahanino) to proceed to Gibraltar, and act *there*, in his behalf, by taking possession of the deceased's estate and effects; appointing, at the same time, Mr. Judah Benoliel (the deceased's successor in the consulate at Gibraltar), his attorney, *to receive the deceased's estate*, in the first instance, and deliver it over to the said commissioners.

On the 24th of July, 1821, administration of the deceased's estate and effects was granted, by decree

of His Majesty's Court of Civil Pleas at Gibraltar, to the said Haggi Thaer Al Hial Rebati, and Haggi L'Arbi Mahanino, on behalf, and as commissioners of His Imperial Majesty Muley Soliman, Emperor of Morocco; security being directed to be taken (and which was taken accordingly) under the special circumstances, to meet any claim of creditors, or others, upon the deceased's estate, which might be made within a year and a day, from that time.

The said commissioners, when about to depart from Gibraltar on their return to Morocco, did, by an instrument of procuration, or power of attorney, under their hands and seals, delegate to the aforesaid Mr. Judah Benoliel, his said Imperial Majesty of Morocco's consul at Gibraltar, all the powers vested in them under, and in virtue of, the aforesaid decree of His Majesty's Court of Civil Pleas at Gibraltar, and also, *all other powers and authorities which they possessed, as the commissioners of his said Imperial Majesty*, to receive and take possession of all monies, estate, and effects whatsoever of the deceased; and to appear before any tribunal or court, whether ecclesiastical or secular; and to do all acts, matters, and things, necessary or expedient, touching, or relating to, the estate and effects of the deceased, *in all places, countries, dominions, or jurisdictions, whatsoever.*

Under these circumstances, in proof of which several documents were exhibited, the Court was moved by counsel to decree administration of the effects of the deceased in this country (it being necessary that administration of those effects should be granted to *some one*, for the use of the party or

1822.  
*Michaelmas*  
*Term.*

In the Goods  
of BEGGIA,  
deceased.

1822.  
Michaelmas  
Term.

In the Goods  
of BREGIA,  
deceased.

parties eventually entitled), to Mr. Judah Benoliel (on giving sufficient security), for the use and benefit of the Emperor of Morocco—the said Mr. Judah Benoliel, in addition to his other *presumed* claims to be administrator, stated above, being the sole public functionary of his Imperial Majesty in the British dominions.

Court—Sir JOHN NICHOLL.

The facts upon which this motion is founded are, I think, sufficiently verified; but I am of opinion, that a specific power, or commission, to some person to take administration of the deceased's effects *here*, is still requisite—the Emperor of Morocco's commissioners, as the attorney of whom it is prayed that administration may be granted to Mr. Benoliel, of effects *in this country*, having been limited, by the express terms of *their* commission, to act at Gibraltar.

Upon the question of legal title to the deceased's effects, if any should be raised—as, for instance, by *the Crown*, or by relatives *on the mother's side*, who might be entitled *here*, though excluded by the Mahomedan law—it might be material to shew, whether the deceased was an ordinarily domiciled person within the British dominions, or was only a temporary resident, as a mere officer of the Emperor of Morocco. But if no such question be raised, either on the part of the Crown, or otherwise, this Court will be disposed to follow the example of the Court of Civil Pleas at Gibraltar; and to decree the administration to any party *specifically* empowered to take it, on behalf of the Emperor of Morocco.

Motion suspended.



In the Goods of Sir THEOPHILUS JOHN  
METCALFE, Bart. deceased.

1822.  
Michaelmas  
Term.  
3d Session.

(On Motion.)

SIR Theophilus John Metcalfe, late of Fern Hill, in the county of Berks, Bart. was the party deceased in this business. He died on the 16th of August, 1822, having, a day or two preceding his death, informed his relations, and friends, that he had made his *will*, whilst in India, and that the same was then remaining there. The deceased was a widower, and left an only daughter, a minor of the age of fifteen years and upwards, the sole person who would have been entitled to his effects in case he had died intestate. He also left behind him two brothers, both respectively resident in India, and two sisters, Lady Ashbrooke, and Georgiana Theophila Metcalfe, spinster, resident in this country. The deceased had himself resided many years in China; and had only come to this country, in the month of April, 1820, for the benefit of his health, with intention of returning to China.

Administration granted, limited to certain purposes, of the goods of a party deceased, until his last will (stated by himself, a few days before his death, to be in India), or an authentic copy thereof, should be transmitted from India to this country.

The property of the deceased in this country chiefly consisted of 10,000*l.* 3 per cent. consols; 7000*l.* India stock; 20 Globe shares; 4000*l.* London Dock shares; a bill accepted by the East India Company, and due in May, 1823, for 950*l.*; money at his banker's, and due from the East India Company (amount uncertain); furniture and effects at the deceased's residence at Fern Hill; and a freehold estate.

These facts were verified by affidavits, of Edward Larken, of Bedford Square, in the county of

1822.  
Michaelmas  
Term.

In the Goods  
of METCALFE,  
deceased,

Middlesex, Esq. who had been agent for the deceased's affairs in England, and of Miss Metcalfe, the sister of the deceased; and the Court was prayed, under these special circumstances, to decree administration of the goods, chattels, and credits of the deceased, "limited for the purpose of receiving and investing the interest and dividends due, or to become due, on the deceased's stock, &c.—and for receiving, and investing, the amount of the *said* bill—and for otherwise protecting the property of the said deceased, to the said Edward Larken, Esq. *until the last will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country.*"

Court—Sir JOHN NICHOLL.

The Court is disposed, under the circumstances, to accede to this application, although it is one of a novel aspect. The deceased cannot be sworn to have died *intestate*; having, according to his own declaration, left a will in India. An administration *pendente lite* is out of the question, as no suit in this Court relative to the deceased's affairs is, or ever may be, depending. Nor can there be an administration *as*, during absence out of the kingdom, or the minority, of an executor, or the like; for, *non constat* who the executor is, or even whether there be an executor. At the same time, an interval of considerable length must elapse before the deceased's will can be forwarded from India—in which interval it may, as stated and sworn, be very material, that some person should be authorized, as well to receive and invest the interest due and accruing upon the deceased's stock, &c. as to act, generally, for the protection and management of his

property in other particulars. Under these circumstances, considering the reasonableness of the application, and that all parties *apparently* interested are consenting, I think that I am bound to comply with this prayer.

Motion granted.

1822.  
*Michaelmas*  
Term.

In the Goods  
of METCALFE,  
deceased.

COATES v. BROWN.

(*On Petition.*)

1822.  
*Michaelmas*  
Term.  
3d Session.

**JUDGMENT.**—Sir JOHN NICHOLL.

The present application to the Court has arisen out of a question, at issue between the same parties, respecting its jurisdiction, determined here in Trinity Term, 1821(a). The Court, upon that occasion, pronounced *for* its jurisdiction—and condemned Mr. Coates, one of the parties to the present petition, who had denied it, in costs. Mr. Coates, in the first instance, appealed from that sentence; but, subsequently, abandoned his appeal. Upon this abandonment of the appeal, and consequent remission of the cause to this Court, the

The obligation to pay costs, pursuant to a monition for payment, held, under the circumstances, not to be dispensed with by the party to whom they were due, having bound himself to waive them, by an instrument executed out of Court.

(a) BROWN v. COATES.

(*On Petition.*)

Bye-day,  
Trinity  
Term,  
1821.

**THIS** was a cause or business of bringing into, and leaving in, the registry of the Prerogative Court of Canterbury, the last will and testament of Thomas Brown, late of Ivington, near Leominster, in the county of Hereford, deceased, who died in

Question of jurisdiction—pronounced *for*—and party disputing it, condemned in costs.

*Quære*, whether the mere holder of a will, monished to bring it in, at the suit of one entitled to administration with that will annexed, has any right to insist on proof of "*bona notabilia*," in the first instance, and prior to bringing in the will.

1822.  
Michaelmas  
Term.

COATES  
v.  
BROWN.

costs here were taxed: a monition was extracted for payment of them, and was duly served and re-

the month of February, 1820, promoted and brought by Francis Heywood Brown, son of the deceased, and one of the residuary legatees named in his said will, against Benjamin Coates, of Eyton, near Leominster aforesaid.

JUDGMENT.—Sir JOHN NICHOLL.

This, in substance and effect, is a question respecting the right of the Court to grant administration, with the will annexed, of the goods of Thomas Brown, late of Ivington, in the county and diocese of Hereford, the party deceased in the cause. In Michaelmas Term last [1820], a monition issued at the suit of Francis Heywood Brown, the son, and one of the next of kin, and one of the residuary legatees named in the will, of the said deceased (the surviving executors having renounced), against Benjamin Coates, of Leominster, in the county of Hereford, the actual holder of the will, respectively parties in the cause, to bring into, and leave the same in, the registry of this, the Prerogative, Court. Mr. Coates appearing to that monition, under *protest*, and, questioning the Court's right to interfere in the premises, its jurisdiction is propounded on the one side, and denied, on the other, through the *somewhat informal* medium of an act on petition; the merits of which the Court has now to determine.

In this act on petition it is stated, in *substance*, on the part of Brown, who propounds the jurisdiction of the Court, that the deceased had property in the diocese of Hereford and elsewhere, sufficient to *found* its jurisdiction; for that one Cooper, resident within the jurisdiction of the Dean and Chapter of Westminster, was, and is, justly and truly indebted to the estate of the said deceased, to the amount or value of upwards of 5*l.*, being the balance of the purchase money of certain lands at Ivington, bargained and sold by the said deceased to Cooper, in the year 1818. On the contrary, it is denied on the part of Mr. Coates, who disputes the jurisdiction, that any such debt, as that alleged, is or can be due from Cooper to the deceased's estate; for that the deceased had assigned over all his property, and these lands at Ivington, with the rest, to him Coates, and a Mr. Carpenter, his creditors, among others, to a considerable

turned. Such costs, however, being still unpaid, the Court was about, in Easter Term last, to en-

1822.  
Michaelmas  
Term.  
COATES  
v.  
BROWN.

amount, in trust, for the *general* benefit of his said creditors, in the year 1816, by a deed of lease and release, which is exhibited, annexed to the act; and, consequently, that the pretended bargain and sale of these lands to Cooper, in 1818, was and is invalid; and can found no just demand against Cooper for 5*l.* or any other sum. The rejoinder to this on the part of Brown is, a denial of the validity of the assignment to Coates and his co-trustee in 1816, and a re-assertion of the validity of the conveyance to Cooper in 1818 of the lands at Ivington, under circumstances which are stated at great length, but into which it is not necessary for the Court to enter. Such is the substance of those parts of the act material to the question of jurisdiction in this case, both on the one side, and on the other.

Now the first question which presents itself in the case, upon this view of it, is, whether a mere creditor, or trustee, or actual holder of a will, or one even who is all these together, which is Mr. Coates's situation, has any right to dispute the jurisdiction of this Court under circumstances like the present. He has no pretence whatever to be administrator; consequently, it should seem that his right to moot any questions about what jurisdiction administration shall be taken in, is extremely problematical. I very much doubt whether Mr. Coates has any *persona standi*, in opposition to a call to bring in this deceased's will; strongly inclining to think his putting the other party on proof of "*bona notabilia*," prior to giving it up, under these circumstances, is a proceeding alike without any foundation, either in principle or in precedent.

But, for argument's sake, admitting Mr. Coates to have this right, ever so incontestably, is there not sufficient, upon the merits, in this case—sufficient evidence I mean of *bona notabilia*—to justify me in compelling him to bring in the deceased's will? I am of opinion that there is. The validity of this trust deed, and the true nature and effect, if valid, are questions which the Court can neither be required to investigate, nor is competent to determine. Abstract this from the case, however, and it is not denied that the deceased left "*bona notabilia*." In the mean time the Court has these admitted facts, that the de-

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*Michaelmas*  
*Term.*  
  
 COATES  
 v.  
 BROWN.

force obedience to its monition by the usual process, when the party monished prayed to be heard, *upon his petition*, against being put in contempt—undertaking, of course, to furnish special grounds to induce the Court, in effect, to revoke its sentence condemning him in costs. Whether he has redeemed that implied pledge, or not, in a manner satisfactory to the Court, is what it has now to determine.

The petitioner Coates, then, alleges, not that he has paid these costs, but that Brown, the other petitioner, has released him from the obligation of payment; and consequently has discharged him from that of obeying the monition. The act on his part states, that, pending an appeal from the sentence of this Court, pronouncing for its jurisdiction, &c. the parties, Coates and Brown, mutually agreed

ceased, in his life-time, bargained and sold an estate at Ivington, over which, consequently, he had, or at least assumed, a disposing power to one Cooper, resident *without* the jurisdiction of his diocesan the Lord Bishop of Hereford; and that there actually subsists, on the part of his estate, a claim against Cooper for a sum exceeding 5*l.*, in respect of, and due as upon that purchase. And this in my judgment is fully sufficient evidence of *bona notabilia* to warrant the Court's compelling this party to give up the will, pursuant to its monition. Upon the final effect of the complicated transactions detailed in this act on the property of the deceased, it will be for a Court of Equity to determine, if Mr. Coates thinks fit to proceed, in equity, for his rights as a creditor and trustee under this deed. Mean time what is suggested on Brown's part is ample, I think, to found the Court's right to grant administration in this case, and consequently its right to compel Mr. Coates to bring in this will, encountered as it is by nothing of an opposite nature which this Court, I repeat, can be required to investigate; or which, if it does, it is competent to decide upon.

Protest over-ruled with costs.

to settle their disputes and differences *out of Court*; and that, in virtue of that arrangement, a deed or indenture was made and executed by and between the said parties, on the 2d of January, 1822—in which Coates, the one party, undertook to abandon the appeal—and Brown, the other party, engaged to pay the costs on both sides already incurred, as well in the Court of Appeal as in this, the Prerogative, Court, touching and concerning the subject-matters in dispute. And it further states, that Brown, at the same time, with two sureties, gave a bond to Coates in the penal sum of 500*l.* conditioned for his due performance of the several covenants contained in the deed. The reply to that statement on the other part is, that these instruments, this deed and bond were obtained from Brown unduly, and upon false suggestions at the office of Coates, himself a solicitor, whose clerk had drawn them up—that Brown, a farmer, unacquainted with business, executed these instruments under no professional advice; and consequently that these instruments, the deed and bond, themselves, by reason of the premises, are null and void.

Now, such being the substance of what is alleged upon both sides material to the question before the Court, it appears to me, upon the very face of this act, that sufficient grounds are not laid for inducing the Court to abstain from enforcing obedience to its monition by the customary process. Obedience to a monition for payment of costs must be by their actual payment; and compelling it, is less, I think, a matter of discretion in the Court, upon this state of facts, than it is matter of right, demandable *ex debito justitiæ*, by the petitioner, at whose suit the

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monition itself, in the first instance, was extracted. This indeed is questioned by the other petitioner merely as with reference to the contents of a deed, not only executed *out* of Court, and forming no part of the proceedings *here*, but the validity of which, at all, is disputed and denied upon Brown's part. Consequently, the *validity* of this deed, independant of every other consideration, is a preliminary question; and is to be proved, in the first instance, before the Court can be required, or can even be expected, to found any proceeding upon it. But this Court is not competent to decide upon, the sufficiency of the consideration, for instance, and the validity in this, and other respects, of the deed, even were it *inclined* to go into the question of its validity. The circumstances too, under which it was executed, are not proper to be investigated *here*, at all—still less in the shape which this proceeding has assumed, that of a mere act on petition, supported by voluntary affidavits. The deed relied upon by Mr. Coates is either valid or invalid—in the latter case, it is, *at best*, good for nothing, and can found no prayer which the Court would be warranted in acceding to—even in the former, it is still, I think, incumbent on the Court to enforce its decree, the more especially as, in taking that part, it can scarcely inflict upon Mr. Coates any permanent injury. For any application to this Court, on the part of Brown, with respect to these costs, being a direct breach of his covenant, Mr. Coates may proceed against him upon that breach, in the proper forum, in the certainty, if the deed be valid, of obtaining an adequate compensation in damages. He has even a bond, with sureties, from



Brown, conditioned, in a large penal sum, for the performance of his covenants—so that these instruments, this deed and bond being valid, as he insists; Mr. Coates, I repeat, can be, ultimately, no loser by the Court's declining; in effect, to rescind its sentence—a departure from its regular practice, which the facts stated in the present petition, are not, in my judgment, of a nature to warrant or excuse.

The result of these several considerations is briefly this. A monition having issued—that monition not being obeyed—and the party who obtained it praying the further aid of the Court to enforce obedience, the Court, I think, in spite of what has been alleged and argued to the contrary in this case, is bound to grant that aid. Obedience to a monition for payment of costs, can only be rendered by payment of costs; if enforcing it, in this instance, is a breach of the alleged deed, Mr. Coates must seek his remedy over against Brown and his sureties in another jurisdiction, which is competent to investigate and decide upon, the validity of this deed, and the accompanying bond. Upon these plain considerations, I reject the prayer of this petition, and with costs. The costs, indeed, follow that rejection, quite as a matter of course. Brown can, with no propriety, be said to have obtained his original costs, if the costs of enforcing the payment of these are withheld from him. In taxing costs, the expence of the monition for payment is always added; and if the monition is not obeyed, in the first instance, the further expence seems to fall by a just and even necessary consequence upon that party through whose neglect or refusal to obey, in the first instance, it has been incurred.

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Such being the sound general principle, and there being nothing in the character or circumstances of this particular case, to exempt it from the operation of that principle, (if not, quite the contrary) I reject Mr. Coates's prayer, and condemn him in the further costs of the present petition.

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 4th Session.

HUDSON v. BEAUCHAMP.

(*On Motion.*)

A witness shall be compelled to answer as to whether he is or is not responsible, in some way, for the party's expences in whose behalf he is examined, *explicitly*.

THE following interrogatory, among others, was administered to John Stayner, a witness produced and examined on behalf of Humphry Hudson, one of the parties in this cause.

“Will you positively swear that you have not advanced any sum or sums of money to the said Humphry Hudson, or to any one on his behalf, for, or in relation to, carrying on the proceedings in this cause? Are you not in some, and what way, responsible for the expences of this suit?”

The witness Stayner had answered this interrogatory as follows:—

“He will swear positively that he has not advanced any sum of money to the said Humphry Hudson, but, as his son-in-law, has advanced money to Mr. Glennie, and to Messrs. Milne and Parry, lawyers, *on his behalf*, in relation to carrying on the proceedings in this cause; and he submits to the judgment of this Right Honorable Court, that he is not bound to answer whether he is, or is not, re-

sponsible for the expences of this suit, and as to which he has given no undertaking."

This answer was objected to for insufficiency, and the Court was moved, by counsel, to decree a monition against the witness, to answer the interrogatory, whether he is, or is not, responsible for the expences of the suit more fully.

On the other hand, it was said, as against the issue of the monition, that the witness had answered the interrogatory sufficiently already, *by implication*—that the witness could only be responsible for the expences of the suit, in *consequence* of having given an undertaking to that effect; which undertaking, however, he denied himself to have given, upon oath. But

(Per Curiam.)

I think that this witness is bound, and may be compelled to answer the interrogatory in question *explicitly*; and, consequently, I direct the monition to issue as prayed.

Motion granted.

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LOCK v. DENNER.

(*On the Admission of an Allegation.*)

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4th Session.

SARAH LOCK, (wife of the Rev. Samuel Lock, D.D. late of Farnham, in the county of Surrey) was the party deceased in this cause. On the 4th Session of Easter Term, an allegation was

In a testamentary suit, a variety of slight circumstances are pleadable, where the case set up by the

other party is charged, by the party pleading, as a case of fraud. General rules as to pleading in such cases.

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given in on the part of the husband and sole executor, propounding a certain paper writing, bearing date on the 13th of June, 1821, as the last will of the deceased. The present question arose upon the admission of a plea, responsive to that allegation, given in on the part of Thomas Denner, a nephew of the deceased, and admitted to be a contradictor to the said will.

JUDGMENT.

Sir JOHN NICHOLL.

The case made for the husband, to which the plea before the Court is responsive, is long and special. Its *general* outline is as follows:—It pleads his marriage with the deceased, then Sarah Clinch, widow, in 1810—that the deceased, in virtue of a marriage settlement which is exhibited, held the power of disposing of her property, then amounting to between twenty and thirty thousand pounds, by will—that, accordingly, in 1816, she made and executed a will, through the agency of Mr. Hollest, of Farnham, her solicitor, bequeathing the bulk of her property to her husband, Dr. Lock, party in the cause—that, in 1819, whilst her said husband was under pecuniary difficulties, and even *consequent* personal restraint, Mr. Hollest prevailed with her, by representations that her property, if left to him, would go merely to benefit his creditors, to make a new will of a different tenor and effect, being that *virtually* propounded by her nephew, Denner, the other party in the cause—that the deceased, almost immediately, repented of having made this new will, and repeatedly expressed, to her female attendant, Luff, to Aslet, her coachman, and to her sister, Mrs. Dean, her displeasure at the

part taken by Hollest, and her determination to make and execute a *third* will coinciding, in substance, with the first—that, at different times, she was on *the point* of invoking the aid, in this respect, of different attornies at Farnham, or in its neighbourhood, but was still prevented by some untoward accident, until she became too ill to carry her intentions into effect through the agency of a professional adviser; finally, *that* on the 18th of June, 1821, the day before that on which she died, the husband, at her earnest intreaty, wrote and prepared the will now propounded in his behalf; and that the deceased executed the same, by her mark, being, at that time, of sound and disposing mind and memory, and perfectly cognizant of the contents of the instrument; and that she so executed it in the presence of three witnesses, who subscribed their names, as such, to a common attestation clause. It is also pleaded, that the deceased was, on several occasions happening between the latter end of 1819, and the Spring of 1821, observed to be writing memoranda upon small pieces of paper, four of which memoranda, of a testamentary nature, pleaded to have been found after her death among her private papers of moment and concern, are exhibited; strongly inferring the *probability, à priori*, that the deceased would do what she is pleaded to have actually done, namely, make or execute a will, giving and bequeathing her property to her husband (a).

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(a) These testamentary memoranda were as follows:—

S. L.

Christmas day.

I have received the sacrament from my husband—he shall be executor.—Sisters 200*l*.—Brothers 200*l*.

Endorsed,

1819, December.

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The above is a general outline of the husband's case, which, as I have already said, is long and special. The adverse case set up in this plea, is, that the husband obtained this will from the deceased when *in extremis*, and in a state of utter incapacity, mental and bodily, by gross and direct fraud; and, in proof of this, it branches out into a great variety of particulars, to the relevancy of many of which it is that the principal objections urged to the admission of the plea in its present state, have been addressed. In particular the plea charges, *that* the testamentary memoranda exhibited on the part of the husband, and strongly inferring, as I have just said, the probability of a will in his favour, *if genuine*, are mere fabrications or forgeries; it even expressly alleges, that the deceased, who is stated

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I shall make Dr. Lock my only executor—my cloathes to my Sisters 200*l.* each—Watch to Francis.

S. Lock.

Endorsed,

Jan<sup>7</sup>.

My dear husband whole and sole executor.

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Mem.

To Mr. Niblet, Guilford, to make my will—my husband executor—Brothers and Sisters 200*l.*—Mrs. Dean 100*l.*—nothing to any one else.

S. Lock.

Endorsed,

Watch to Frank—Cloathes to sisters—Dr. to pay Mr. Oke.

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March 6, 1821. My dear husband shall be my executor, and have all I die possessed of.

S. Lock.

Brothers and sisters 200*l.*

Endorsed,

Thomas Denner nothing to do with my affairs.

to have been a coachman's widow, and in early life a domestic servant, was at all times, and down to the time of her death continued to be, so illiterate, as to be incapable of reading any written instrument, or of writing more than her names; which she had been taught to do, with great difficulty, by tracing over the letters, previously written for her, of which her christian and surname were composed.

Now, where a direct fraud is charged in a suit of this description, as in the present instance, the party charging it has, or should have, a latitude of pleading, hardly to be conceded in any other instance. Cases of fraud, if tolerably well concerted, are, generally speaking, only to be detected and defeated by inductions of particulars, many, perhaps, apparently, trivial: so that, to exclude these from a plea of this description would tend, in effect, to encourage fraud, by affording it, that is, its best chance for impunity. The sum or substance of the objections taken to this plea, is, that facts are alleged in it, which bear too slightly, it is said, upon the point at issue to have any claim to be admitted. But in such a case it is difficult to say, that any facts bear *too slightly* upon the point at issue, which bear at all—for, of course, I do not mean to say that facts are pleadable, which are, *wholly*, either immaterial, or irrelevant.

These observations, I think, go to dispose of nearly the whole substantial matter into which the objections urged against the admission of this allegation, in its present form, are resolvable. The Court will advert, however, briefly, to one or two of these, by way of illustration of the general prin-

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ciples which it conceives applicable to the pleadings, generally, in cases of this nature.

For instance, it is said that the deceased's antenuptial history—her situation in early life, as a domestic servant, and subsequent marriage to a coachman; has nothing to do with the case, and ought not to be pleaded. I entertain a different opinion. It is pleaded, that the deceased was so illiterate as to be incapable of writing—in proof, this, that the testamentary memoranda exhibited, as I have said, on the part of the husband, are, what they are alleged to be, mere fabrications or forgeries. Now, it neither is nor can be denied, that this illiteracy of the deceased is pleadable, as being a material fact in the cause. And being so, I am of opinion, that her early history and connections are also pleadable as auxiliary evidences of that fact; to the Court's belief of which, without some intimation of these, her circumstances in after life, would naturally present a serious, not to say, insurmountable, obstacle.

Again—that the husband was under difficulties, and even, notwithstanding his clerical profession, a bankrupt, in the year 1819—that the deceased's goods, and household furniture, secured to her separate use by her marriage-settlement, were repeatedly taken in execution for *his* debts—that the husband, not merely by undue influence, but by harshness and severity, induced, or compelled, the deceased to sanction his applications to her trustees for advances of money—and that such accordingly were made to him, by the said trustees, at different times, to the amount of upwards of 12,000*l.*—all this, it is said, is foreign to the question of whether



the deceased executed this will, and is advanced in the plea for no other purpose than to discredit the husband, and, by consequence, to produce an impression on the mind of the Court unfavourable to his case. If the Court viewed these allegations in this light, it would instantly reject them. But I am inclined to consider them in another point of view. The will of 1819 is, *virtually*, set up in opposition to this propounded by the husband; it therefore appears to me, that they are material to the *real* issue in the cause; for they go, as well to negative that part of the husband's plea which charges the will of 1819 to have been wrung from the deceased by importunities, and false suggestions, as to shew the improbability, under all the circumstances, of the deceased's revoking that will, and disposing of her property, as she is alleged to have done, without restriction or limitation, in her husband's favour.

It is pleaded, again, that when the deceased had occasion to communicate with any person by letter, she, *invariably*, employed some friend or relative to write such letter for her, to which she, *usually*, subscribed her names. The pleading of this fact is not objected to, but an objection is taken to the number of letters, so written and subscribed, annexed as exhibits, being altogether no fewer than eighteen, addressed, at various times, to her nephew, Denner, party in the cause. It is observable, however, that these exhibits answer a double purpose. So far as the bodies go, they are material in support of the deceased's incapacity to write, and *invariable* employment of a third party to conduct her epistolary correspondence; an inference

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which could not be fairly deduced from merely one, or two, exhibits of this description. So far, again, as the signatures are concerned, *these* are serviceable in another way. For it is pleaded, that the testamentary memoranda exhibited on the part of the husband will appear, on a careful comparison, not to have been written by one and the same party who signed these exhibits; that party being, expressly so pleaded, the deceased in the cause. Now, if evidence of hand-writing by comparison be admissible at all, which it is too late to make a question of, at least in these Courts, the more numerous the *standards* of comparison furnished are, the more satisfactory that evidence is likely to be. So that, considering the double use to which these letters are applicable, I am not disposed to think the number exhibited, under the circumstances of this case, considerable as it is, altogether excessive, or objectionable.

Again, it is pleaded that Sarah Luff, and Betty Limpus, two of the subscribed witnesses, have repeatedly declared, that they were desired to attest the pretended will, by the husband, Dr. Lock—that the witness, Limpus, placed her mark, without knowing the nature of the instrument which she was attesting—and that no conversation whatever respecting a will, or the contents thereof, passed between the deceased and those about her, at the time of the pretended execution, she being then in a dying state. The objection taken to this part of the plea is, that it goes merely to introduce "*declarations*," which, the Court has been told, it is hazardous to admit, and which, when admitted, are of little import. As evidence of fact, I grant this to be true

of declarations; but I understand them to be pleaded, in this case, as evidence to character; and as evidence to character, it is a known rule, that declarations are receivable in *all* cases. It has always been held, that the credit of a witness might be impeached, by shewing him to have made statements out of Court, contrary to what he has sworn. For the purpose of impugning the testimony (*presumed*) of Luff and Limpus, these "declarations" may clearly be pleaded, and must go to proof.

Lastly, it being pleaded that Luff, upon quitting his service, was established in business as a milliner by Dr. Lock, near his own house, at Farnham; and that he pays, or is responsible for, the rent of her shop—this also is objected to as having no bearing upon the question. The husband, it is said, might surely advance an old servant of his deceased wife, without being suspected of bribing her to give false evidence, even though she happens, necessarily, to be a witness in his cause. To some extent I admit this; and if the witness referred to in this article were a mere casual witness, in an ordinary cause, I should be disposed to reject it. But the features of this case are somewhat extraordinary; in particular, here is a charge of gross and direct fraud—of gross and direct fraud to which, if it be, Luff must be privy, from the whole complexion of the husband's plea. She is not only a subscribed witness to the will, real or pretended, but she is vouched as a witness to nearly every material fact in the allegation which propounds it. Now, I do think, that every circumstance, however slightly and collaterally only, affect-

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ing the credit or character of such a witness in such a case, may be fairly pleaded.

Upon the whole, then, the Court is disposed to consider the entire substance of this allegation admissible. As the present, however, is a case which *must* necessarily spread out into a great quantity of matter, it is peculiarly desirable to compress the allegation into the narrowest possible compass within which all the relevant facts can be fairly and adequately stated. It appears to me, that it is objectionable in this particular in no common degree, and that it may be materially reduced in bulk, without any substantial curtailment, by the process which I am about to suggest. Its actual application would possibly be attended with little benefit in the present case, as nearly the whole extra expence occasioned by the diffuse *mode* of pleading practised in this instance, *may have* been already incurred. Still, it may be fit that the Court should suggest it; in order to recommend its application in future, *similar*, cases.

In the first place, then, this allegation would be materially compressed, without any curtailment in point of substance, by omitting to *recite* the articles contradicted. The mere recitation of one article only of the former plea, contradicted in the present, occupies, I observe, five sides of paper. This is quite unnecessary, and very objectionable, especially where it runs to this extreme length. It would be quite sufficient to plead, generally, that in opposition to such, or such, an article of the plea given in by the other party, the party proponent alleges and propounds, &c., and so, to go on pleading contradictory facts.

But, secondly, this allegation might be still further, usefully, abridged by not pleading, *seriatim* that is, contradictory *facts* even, which the party can produce no witness to, and in respect to which he can entertain no reasonable hope of deriving any benefit from the *answers* of the other party. For instance, the 21st article of this allegation is made to extend over several sheets of paper, by the statement, furnished by the party who propounds it, relative to the immediate *factum* of the disputed instrument, being negatived *seriatim*. As thus—that the said deceased “did not, upon the said 5th of June, 1821, the day of the date thereof, give verbal instructions and directions to the said Samuel Lock, party in this cause, to make and prepare her will—nor did the said Samuel Lock make and prepare a will for the deceased to execute, pursuant to such instructions, and directions—nor was the same, after being prepared for execution, read over to, or by, the said Sarah Lock, deceased—nor did the said deceased know, or understand, the contents thereof, and like and approve of the same—nor did she (being from weakness incapable of subscribing her name) set her mark, and affix her seal thereto, or publish and declare the same as and for her last will, &c. &c.” The party tendering the allegation, *plainly*, relies for success upon being able to prove, not this string of negatives, but the one affirmative fact pleaded at the conclusion of the article, inconsistent with the whole adverse statement respecting the *factum* of the alleged will—namely, that the said deceased “was, on the said 5th day of June, 1821, had been for some time before, and always afterwards continued to be, of unsound mind; memory and understanding, and utterly incapable of

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any serious or rational act, requiring thought, judgment, and reflection." And this being so, I apprehend, that it would have been quite sufficient for the party to have pleaded this one affirmative fact, without pleading the string of negatives which precedes it at all, or, at least, without pleading these negatives *seriatim*, and in detail.

And here I may further observe, that it is at best useless in pleading, *generally* speaking, to contradict, *in detail*, any statement which can only be spoken to by witnesses vouched to sustain it in the adverse plea. The party pleading in such case, either does, or does not, make his vouchees witnesses. If he does, the other party can get at their evidence much more usefully to himself by cross-examining these, than by re-producing them upon a counter-plea; and merely to counterplead, without re-producing them (these being supposed the only *capable* witnesses to the statement), would answer *no* end. If, on the other hand, the party pleading does not make his vouchees, witnesses, still the omission of a *formal* counter-plea, as to the particular statement, can do no injury, *generally* speaking, to the other party: for if persons are vouched in a plea, without being made witnesses, the party vouching them not merely *fails* in proof, but the ordinary, at least, inference is, that the persons vouched would, if made witnesses, have *contradicted* the plea. I can easily conceive the above liable to many exceptions—still I apprehend it to hold, as a general rule.

With these observations, which may be applied or not to the reform of this particular allegation, at the discretion of the counsel on both sides, as for the present, I admit the allegation.

BELL v. ARMSTRONG.

(On Petition.)

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Bye-day.

WILLIAM BELL, formerly of Upper George Street, Portman Square, but late of the Nunnery, at St. Margaret's, in Buckinghamshire, was the party deceased in this cause. He died in July, 1818; and, in December, 1820, probate of his will, dated the 14th of April, 1817, was taken, in common form, by Richard Armstrong, as sole executor, and residuary legatee.

A next of kin, who has acquiesced in probate taken in common form, and has even received a legacy due to him as under a will, may still be at liberty to call in such probate, and put the executor on proof of that identical will *per testes*, first bringing in the legacy so received.

In April, 1822, a citation issued at the suit of John Bell, the brother, and only next of kin, and one of the executors and substituted residuary legatee named in a former will of the deceased dated the 21st of November, 1815, against the said Richard Armstrong (respectively parties in the cause), to bring in probate of the latter will, that of April, 1817, and shew cause why the same should not be revoked; and why the will itself should not be pronounced null and void. Mr. Armstrong appeared to this citation, under protest; and the present question arose upon the merits of that protest, subsequently extended into an act, which act had also been written to on the part of the next of kin.

For the party cited it was, in substance, alleged, *that*

William Bell, the deceased, left his house in the neighbourhood of Portman Square, for the benefit of his health, in the beginning of March, 1817, and took up his residence at that of George Saunders, with whom he had been long previously

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acquainted, in the neighbourhood of Hemel Hempstead, where he died, in July, 1818, having first duly made and executed his last will, dated 14th April, 1817, wherein he appointed Richard Armstrong, the party cited, his sole executor, and residuary legatee—*that* the said Richard Armstrong, on or about the 15th of March, 1817, communicated to John Bell, the other party in this cause, then resident in Cumberland, intelligence of such his brother's removal; having previously (to wit, on or about the 11th day of February, 1817) acquainted him with his said brother's precarious state of health, and incapacity to manage his affairs (an incapacity from which he afterwards, for a time, recovered), and advised him to come to town, as upon that account—*that* after the deceased had made his will as aforesaid (namely, about the 22d or 23d of April, in that year), the said John Bell arrived in London, and was informed by the said Richard Armstrong (till then personally a stranger to him), that the said deceased had made his will since he had been at the house of the said George Saunders; and, at the same time, was recommended by the said Richard Armstrong, to go down to the said George Saunders's, in order to see, and communicate with, his said brother—*that* the said John Bell accordingly went to, upon the following day, and remained at, the said George Saunders's till the next morning; on which occasion, he had full opportunity of seeing, and conversing with, his said brother, and of making any inquiries he might think fit relative to his said will, or upon any other subject—*that* in the latter part of 1817, the deceased, having sustained a relapse, was gradually reduced to a state of imbe-

cility, in which state, certain pretended codicils to the will of 1817, were procured from him, the validity of which, respectively, was contested by the said Richard Armstrong in two suits lately depending in this (the Prerogative) Court, described, respectively, as "*Maddy and Scott v. Armstrong*," and "*Armstrong v. Saunders*"—*that* the first of such suits was depending from August, 1818, to February, 1820, when the codicil propounded in it was pronounced to be null and void; shortly after which, the second commenced, but was voluntarily abandoned by the party defending it towards the close of the said year (a)—*that*, in the December of that year, probate of the said will was taken by the said Richard Armstrong, of which he remained in the undisturbed possession till May, 1822—*that*, shortly after the said deceased's death, the said John Bell came to London, and was informed of the said will, and pretended codicils; when, and afterwards, he expressed his entire acquiescence in the said will, and his hope that the said Richard Armstrong would succeed in his opposition to the said pretended codicils—*that* the said John Bell had full

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(a) By the will of 1817, the residue, after payment of legacies (among which were legacies to George Saunders and his family, to the amount of 1500*l.*), was bequeathed to Richard Armstrong. That residue was now *alleged*, in real and personal property, to amount in value to 17,000*l.* By the *first* codicil, the residue was purported to be given equally between Armstrong and Saunders—and by the second, the whole of the residue was given to Saunders and his family, and only a legacy of 1000*l.* to Armstrong. The first of these codicils was dated in July, 1817—the second (the codicil, that is, *first*, propounded, viz. in the suit of "*Maddy and Scott v. Armstrong*"), in March, 1818.

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knowledge of all the proceedings had in this. (the Prerogative) Court, in the two suits aforesaid, respecting the validity of the said codicils, and had ample opportunity of, at the same time, disputing that of the said will, had he been so disposed—that the existence of a copy of the deceased's former will, of November, 1815, in which the said John Bell was named an executor and the substituted residuary legatee, was communicated to the said John Bell, immediately after the deceased's death, who *then* declined having the same brought forward—and, lastly, *that* the said John Bell had taken and accepted, from the said Richard Armstrong, after probate, the balance (a) of a legacy of 500*l.* bequeathed to him by that very will, the validity of which he was now seeking to overthrow. Under these circumstances, it was prayed that the Judge would pronounce for the protest, and dismiss the suit.

In opposition to this prayer, it was, in substance, alleged, for the party who took out the citation, *that*

The said deceased did not leave his house, of his own accord, as for the benefit of his health or otherwise, at the time specified on behalf of the other party, for that of the said George Saunders; but, that he was carried away, for sinister purposes, in pursuance of a plan formed by, and between,

(a) Namely, 200*l.* The sum of 300*l.* on account of the legacy of 500*l.*, to which he was entitled under the will, had been advanced to him, pending the suit, by the administrator pending the suit, who was authorized in that behalf by the said Richard Armstrong, jointly with the other parties to the suit, Maddy and Scott.

Richard Armstrong, the other party, and the said George Saunders, to get the said deceased into their power, and possession, and to take advantage of his childish and imbecile state, in order to obtain a will from him in their favour—*that* the pretended will of April, 1817, was not *duly* made and executed by the deceased; and that the same was prepared from instructions furnished by, and in the handwriting of, the said Richard Armstrong—*that* the said John Bell, at the time of his visit to his said brother, at Hemel Hempstead, although aware that he had made a will, was ignorant of the contents thereof, and in whose favour the same was made—*that* he had no adequate opportunity of communicating with his said brother, whom he found in a very weak and imbecile state both of mind and body, on that or any other subject, upon the occasion of such visit, by reason that the said George Saunders, his wife, or one of his family, was about the deceased nearly the whole time the said John Bell was with him; and that he was the less anxious upon that head, as confiding in the assurances of the said Richard Armstrong, that his, the said John Bell's, interests should, at all events, be consulted and provided for—*that* if the said John Bell ever expressed an acquiescence in the provisions of the said pretended will, or a wish that the said Richard Armstrong might succeed in his opposition to the said pretended codicils, he did so in the expectation, created by the assurances of the said Richard Armstrong, that if he succeeded, he would divide the said deceased's property among, or would otherwise most materially benefit with it, the family of the said deceased; for which family, he some-

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times declared, that he was "fighting," and not for his own particular emolument—that the said John Bell had no knowledge whatever of the will of November, 1815, or the copy, prior to the month of June, 1821, when the *latter*, the copy, was communicated to him by William Harding, by whom the same had been taken, or made, at the express instance of the deceased, in the year 1816 (a).

In a rejoinder, on the part of Mr. Armstrong, it was denied *that* he the said Richard Armstrong had ever expressed himself in a manner which ought to, or could, have led the said John Bell to believe that he would divide the deceased's property among his relatives, in the event of succeeding in his opposition to the pretended codicils; but it was alleged, *that* the said Richard Armstrong, having deter-

(a) The original of which said will, after being so copied, was deposited in the deceased's iron chest, the key of which was alleged, by the next of kin, to have been taken from the deceased's pocket, by Elizabeth Saunders, wife of George Saunders, in the latter end of June, 1817, and to have been delivered to the said Richard Armstrong, for the purpose of opening the said chest—that the said Richard Armstrong came to London therewith, and went to the house of the said deceased; a few days after which, the said chest was carried from the deceased's dwelling-house to the house of the said George Saunders, in one of *his* carts—lastly, that on the said William Harding making inquiries of the said Richard Armstrong concerning the said will, a few days after the deceased's funeral, the said Richard Armstrong said, that "it had not been found." The answer to these allegations, on the part of Mr. Armstrong, merely was, that the key of the said chest "had been in his possession in, or about, the month of June, 1817, but that it had been returned to Saunders, without being made use of, or the chest having been opened by him, the said Richard Armstrong."

mined to oppose the said codicils, *did* make an offer to the said John Bell to *share* the whole property, in the event of being successful, provided the said John Bell was willing to incur, jointly with him, the trouble and expence of opposing the said codicils; which offer, however, the said John Bell declined to accept; expressing at the same time his entire concurrence in the bequest of the property (as his said brother had thought proper to make it) to the said Richard Armstrong.

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JUDGMENT.—Sir JOHN NICHOLL.

William Bell died in July, 1818, leaving a widow (*a*), and John Bell, his brother, and only next of kin. In the month of December, 1820, probate of his will, dated on the 14th of April, 1817, was taken by Richard Armstrong, the sole executor named in it, *in common form*, with the perfect cognizance, it must at least be admitted, of the deceased's brother, Mr. John Bell. In the month of April, however, in the present year, 1822, a citation issued, at the instance of this brother, calling upon the executor to bring in probate of this will so taken, and to shew cause why the same should not be revoked, and declared null and void. Mr. John Bell, the applicant, appears not only in the character of the sole next of kin of the deceased, but in that also of one of the executors, and the substituted residuary legatee, in a former will of the de-

(*a*) This widow was admitted to have been under restraint, as *non compos*, from a period anterior to the death of the deceased in the cause. What, the Court inquired, in the course of the argument, was to prevent *her*, or some one in *her* behalf, from calling in the probate, and putting the executor on proof of the will?

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ceased, dated in November, 1815, a copy of which (for *non constat* what has become of the original), is annexed to his affidavit of scripts.

To the citation so taken out, the party cited has appeared under protest—alleging grounds upon which he insists that the brother has forfeited his right of putting him on proof of the will, *per testes*. These alleged grounds have produced a counter-statement from the brother, upon which the executor has rejoined; and the question for the Court to determine is, whether, under the circumstances stated upon the one side and upon the other, the brother is, or is not, barred from putting the executor on proof, *per testes*, of the will. Now,

Next of kin, as such merely, are entitled to call for proof, *per testes*, of any deceased's will, of common right. If, indeed, the executor propounds and proves it, *per testes*, of himself, which he may do—duly citing the deceased's next of kin to "*see proceedings*,"—all next of kin, so cited, generally speaking, are thereby for ever barred. Nay, if he so propounds, and proves it against *certain* only of the deceased's next of kin, without having cited them *all*, the others, even though uncited, if to a certain extent privy to, and aware of, the suit, shall not put the executor on proof, *per testes*, of the will, so once already proved, a second time. This was the case of *Newell and King v. Weeks*, decided here in Hilary Term, 1814 (*a*), the principle of which has been recognized, and acted upon, in other instances.

But no such bar to the exercise of this *common*

(*a*) See case of *Newell and King v. Weeks*, 2 Phillimore, p. 224.

right on the part of the next of kin, exists in the present case, that I am able to discover. The will itself has never been propounded—its validity has never been put in issue by *any* party. In the suits respecting certain supposed, or pretended, codicils, lately depending in this Court, no party was before it who had an interest to controvert its validity. Not the supporters of the codicils, respectively—on the contrary, the *will* was the very basis of the instruments which they were seeking to substantiate. The brother, again, had no inducement to intervene in the suits touching the validity of these codicils—if the codicils, or either of them, were established, there was an end of any possible interest that he could have to impugn the will. But the codicils being both set aside, he has a manifest interest to impugn it—an interest which, I am not of opinion that he is barred from pursuing, by what the executor has alleged, giving him credit even for the truth of the whole of his protest.

Much is insisted in the protest, on the brother's *acquiescence* in the executor's taking probate of the will. Now, without at all adverting to the grounds upon which that acquiescence is said to have been founded, I may observe, that a *mere* acquiescence (that is, an acquiescence accounted for by no special circumstances), on the part of the next of kin, to an executor's taking probate, is no bar whatever to his calling it in, and putting the executor on proof of the will. If it were, no probate could be called in by a next of kin, unless immediately upon its becoming known to him that probate had been taken—the very contrary of which, is matter of every day's experience.

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Nor, again, is acquiescence a bar, even though accompanied, as in this case, by receipt of a legacy, under the very will sought to be controverted. This has been determined in a great variety of cases. For instance, in that of Core and Spencer, which occurred here in 1796, where Spencer, the executor, was cited to bring in the probate of a will, taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that will for five of the eight years, and she, Core, herself, her mother dying at the end of the fifth year, for the remaining three. Spencer, in that case, appeared under protest, as the executor has in this, and contended, that Core was barred from putting him on proof of the will. But the Court thought otherwise, and over-ruled the protest. That, however, was an infinitely stronger case to build this argument upon than the present, if mere acquiescence and receipt of a legacy could bar. In the judgment delivered, by my predecessor (a), in the case of Core and Spencer, he adverted to various cases (b), all authorities to the same point. At the same time, it was held in every one of these (and indeed they were *principally* cited, in that case of Core and Spencer, for the purpose of shewing), that the legatee must *bring in* his legacy, before being permitted to contest the will—under the authority of which, I hold, that I am bound, in over-ruling this protest, to direct the legacy to be brought in, before the brother proceeds. The bringing in of his legacy will be a test of the since-

(a) Sir William Wynne.

(b) Pyefinch v. Palmore, formerly Pyefinch, Prerog. 1767. Ashby v. Hay and Thrale, Prerog. 1768. Legge and others v. Brookman, formerly Cowdery, Prerog. 1777.

city of his opposition to the validity of the will; and will prove it to be not merely vexatious. At the same time, it will be a security to the executor, in case of the next of kin being condemned in costs: for I hold, that a next of kin (or the executor of a former will, for the same reasons apply in both cases), who calls in a probate, once taken, even though in common form, and puts the executor upon proof, *per testes*, of his will, does it at the peril of costs—his ordinary exemption from liability to costs upon such occasions, not extending to one of this particular description.

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The case of nearest resemblance to the present, in which a protest was admitted, and the executor dismissed, is that, which has been cited in the argument, of "*Hoffman and White v. Norris (a)*." At the same time, though similar to it in one important feature, it is distinguished from it, in a great variety of particulars. It is true, that in that, as in this, case, the will had never been propounded, and probate had been taken only in common form. In that case, however, there had been an acquiescence, not even attempted to be accounted for by any *special* circumstances, of *nine* years. In a suit, too, in Chancery, arising out of that will, soon after probate, Hoffman, the next of kin taking out the citation, in his answers had admitted both the will and the probate (*b*)—a decree in Chancery had followed, operating upon a lapsed legacy in that will—and under that *decree* (not as upon an intestacy) Hoffman had persisted in acting

(a) See 2 Phillimore, 230.

(b) Namely, by stating in his answers, that he believed the deceased to have made his will, and that the will had been *duly* proved.

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for five years together—namely, by receiving, during all that time, interest upon a portion of such lapsed legacy, to which he was entitled in his character as next of kin. The will itself, again, had been written by the deceased himself, all *propria manu*, nearly five years before his death, in India—and not a circumstance was even suggested, which could excite a reasonable suspicion or doubt of its genuineness and validity in that case. Here, on the contrary, independent of other obvious distinctions, the will itself is by no means devoid of *suspicion*, on the face of the transaction; although (if I have a right impression of the general complexion of the evidence taken in the suit respecting the validity of the codicil), there may be no great prospect of the next of kin opposing it successfully. It is admitted, that the deceased, at the time of executing the will, was in a state of considerable *general debility*—the instructions are in the hand-writing of the executor, and party principally benefited—lastly, a codicil made, after no very long interval, has been actually set aside by the Court, on the score of the testator's incapacity. Nor is the situation, both local and pecuniary, of the next of kin, Mr. John Bell, a small farmer in a remote district, the county of Cumberland, a circumstance by any means to be left out of the account. Upon these considerations, I over-rule the protest—but shall feel myself bound to dismiss the executor from the effect of the citation, if the legacy be not brought in, so that the suit may proceed, within a reasonable time.

Protest over-ruled—question of costs directed to stand over till the final hearing of the cause.

POPPLÉ v. CUNISON and Others.

(*On the Admission of an Allegation.*)

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Term.
Bye-Day.

JANE FAULDING, late of Coventry Street, in the parish of St. James, Westminster, in the county of Middlesex, widow, (the party deceased in this cause) died on the 8th day of August, 1822, leaving behind her two sisters, and several nephews and nieces, the children of three deceased brothers, entitled, in distribution, to her personal estate and effects, in the event of her being pronounced to have died intestate.

The following testamentary paper, purporting to be instructions for a will of the deceased, bearing date the 13th of October, 1819, was propounded on behalf of Mary Popple, widow, a principal annuitant, or legatee, named in the same, one of the deceased's sisters, and was opposed on the part of Ann Cunison, widow, the other sister:—

"Instructions for a will," so headed and indorsed, and how imperfect soever in themselves, if proved to have been signed by a deceased, (even many years before her death) with intent to render them operative *pro tanto*, in the event of her dying without any further act done, are entitled to probate.

" 13th October, 1819.

" Instructions for the will of Mrs. Jane Faulding, of Coventry Street:—25*l.* per year to Maria Wilson, widow of William Wilson, for life, and after her decease the sum of 500*l.* to be equally divided between William, Thomas, and Eleanor, three of the children of the said Maria Wilson, to be paid within twelve months after her decease, with interest in the mean time; to Ann Cunison, of Brehwood, sister of Mrs. Faulding, 25*l.* per year for her life, and after her death the sum of 500*l.* equally to be divided between her children, to be paid within twelve months after her decease, with

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" interest in the mean time; 100*l.* a-piece to Eleanor, Mary, Jane, and Fanny, daughters of Mrs. Faulding's late brother, Andrew Wilson, late of Stifford, to the period within twelve months after Mrs. Faulding's decease; to Mary Ann Wilson, daughter of Mrs. Faulding's late brother John Wilson, her watch, trinkets, and clothes; to Mrs. Mary Popple, sister of Mrs. Faulding, an annuity of one hundred pounds per annum for her life, to be payable quarterly, on the usual quarterly days, and as to the residue of Mrs. Faulding's property, the disposition thereof to be deferred for the present; the sum of 5*l.* each to Mrs. Maria Tipping, of Saint Martin's Lane, Elizabeth, Sarah, and Caroline Reed, of Grafton Street, Fitzroy Square, to purchase mourning rings; to Miss Sophia Stratton, of Kennington, the sum of fifty pounds, to be paid at her age of twenty-one years.

" JANE FAULDING."

(Indorsed)

" 13th Oct. 1819,
 " Mrs. Jane Faulding,
 " Instructions for Will,"

The allegation propounding this paper pleaded to the following effect:—


1. The first article pleaded that the deceased died on the 8th of August, 1822, at the age of about sixty years, in consequence of an apoplectic stroke on the 5th of August, three days preceding; and that from such period to that of her death, she, the deceased, was so greatly affected as to her *speech*, and *bodily powers*, as to be unable to make herself understood by the persons about her.

2. The second article pleaded that the deceased, for the last eight or nine years of her life, had been intimate with Mr. Christopher Bedingfield, an attorney at Gravesend—that, on the 13th of October, 1819, she advised confidentially with the said Christopher Bedingfield, on the subject of her will, who, in her presence, and pursuant to her instructions, drew up the paper writing propounded in the cause—that the deceased approved of the same, and “*was apprized that by executing the said paper, it would operate as her will in the event of her dying, without doing any further testamentary act*”—and that, in testimony of such approval, and with intent to render the said paper writing operative in such event, she subscribed the same, and after so doing delivered it to the said Christopher Bedingfield for safe custody.

3. The third article pleaded that, about six months after the above, Mr. Bedingfield called upon the deceased at her house in Coventry Street, and inquired, “whether she had determined as to the disposition of the residue of her property;” to which the deceased replied, that “she had not then, but would speak to him about it at Gravesend,” where she promised to make him a visit *shortly*.

4. The fourth article pleaded that the deceased actually went on a visit to Mr. Bedingfield, at Gravesend, in August, 1821; but that Mr. Bedingfield misapprehending, from something said by the deceased, that she had been consulting another solicitor on the subject of her will, and being unwilling to obtrude his professional assistance, never mentioned the subject of her will, and that nothing relative to it ever passed between him and the deceased, either then or subsequently.

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5, 6. The fifth and sixth articles pleaded merely the hand writing of the signature, and the custody of the paper by Bedingfield, from the day upon which it was written till after the death of the deceased.

The admissibility of this allegation was denied, as pleading facts incapable of sustaining the paper propounded. It was said the paper is imperfect *as a will* in every respect—it is a mere list of legacies, leaving the residue of the deceased's property undisposed of—it appoints no executor—it is headed and it is indorsed "Instructions for a will" merely. To sustain such a paper, under the circumstances of the case, would require more stringent proof of the deceased's intending it to operate, than evidence taken upon this allegation is likely to furnish. The single witness vouched to the material part of the allegation is Bedingfield. All he can be expected to say is, that the deceased gave these instructions—that she signed them—and "was apprized" (not stating how, or by whom, or under what limitations) that the instructions, so signed, would, in a certain event, operate as her will. The just inference from no more being pleaded is, that Bedingfield knows, and can say, no more; and it was argued, that it would be extremely mischievous, on general principles, to pronounce on such evidence for a paper so imperfect; the very existence of which the deceased had, apparently, not adverted to for years, and perhaps had forgotten.

JUDGMENT.—Sir JOHN NICHOLL.

I think it is too much for the Court, in this stage of the cause, to anticipate with the counsel against

the admission of this allegation, what may be the final effect of Mr. Bedingfield's evidence upon the allegation. That evidence *may* be such as to leave the case pretty much in the condition in which he has sought to place it: on the other hand, it *may* so satisfy the Court, as to the deceased's persuasion, that this paper would operate, *pro tanto*, in case of her dying otherwise intestate, as to render it the duty of the Court to pronounce for it, even in its apparently imperfect state. I think therefore that I am bound to let in this evidence, by admitting the allegation. It will be open to the other party, by cross examining, to sift and probe this gentleman, as to the grounds of his belief, that the deceased's persuasion was that just described, assuming him so to depose—a process which will enable the Court to judge of the extent and degree, to and in which this persuasion was felt by the deceased—assuming her again, that is, to have felt so persuaded at all. If the result should be a conviction, on the mind of the Court, that the deceased signed these instructions, not merely to authenticate them *as* instructions, but to give them dispositive force and effect, in case of her doing no farther, or other, testamentary act, it will be imperative on the Court to carry her intentions into effect, so far, by decreeing administration with these instructions annexed. If the evidence fail to produce that conviction, the party must be pronounced to have died wholly intestate, and a *general* administration must accordingly be decreed. Without, therefore, at all anticipating what may be the final judgment of the Court in this cause, it is, for these reasons, one which I think myself *not* au-

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thorized to put a stop to, *in limine*, by rejecting this allegation.

*Allegation admitted (a).*

(a) This allegation was admitted on the Bye-day after Michaelmas Term (4th of December) 1822. On the 1st of January following, 1823, Mr. Bedingfield died, without having been examined upon it. On the fourth Session of Hilary Term, the 13th February, a second allegation was given in, on behalf of Mrs. Popple, the party who propounded the instructions, pleading the death, character, and hand-writing of Mr. Bedingfield; and further, in substance, pleading, that a copy of the allegation admitted (as above) propounding these instructions, had been sent, in the first instance, to Mr. Bedingfield, and that Mr. Bedingfield after examining the same with his clerk, Mr. Pearson, had returned it to the proctor of Mrs. Popple duly settled and approved, with the following indorsement:—"18th November, 1822, examined and settled allegation *re* Faulding with Mr. Pearson." Annexed to this allegation was the draft allegation itself, so settled and approved, and so indorsed by Mr. Bedingfield. The admission of *this* allegation was also opposed, on the part of Mrs. Cunison.

COURT.—SIR JOHN NICHOLL.

I admit so much of this allegation as pleads the death, character, and hand writing of Mr. Bedingfield, the writer of the instructions. The party pleading is entitled to the admission of this part of her allegation. The loss of Mr. Bedingfield's evidence *may* be fatal to her case; he may have been, and probably was, the only person who could speak to the deceased's intention, that these instructions should operate, in a certain event, as her will. At the same time I cannot *assume* that Bedingfield was the *single* witness capable of speaking to this, though no other person is vouched—evidence upon this head *may* be to be had, in some other quarter. The suit therefore may still proceed, notwithstanding the loss of Bedingfield's testimony; in which case the death, character, and hand writing of that gentleman, he having been the writer of the paper propounded, may, and should, be pleaded and proved.

The rest of this allegation, I think, inadmissible. Its purpose obviously is to impress upon the Court, that Mr. Beding-



field's evidence, if taken, would have sustained the plea. But the Court will infer that, *generally*, without this part of the allegation now tendered—and with it, it can do no more—so that rejecting this part of it, is no real disservice to the party who presses for its admission. The Court may fairly, and will, presume, that the original plea was drawn up from instructions given by the solicitor, and that his evidence, if taken upon, would, in the main, and generally speaking, have supported the plea. The Court's pronouncing for these instructions, indeed, upon that presumption *alone* (if the loss of Bedingfield's evidence is *really* incapable of being supplied, *aliunde*) is another question. Allegation admitted as reformed.\*

\* This cause came to a final hearing on the fourth Session of Trinity Term (1823), on the evidence taken upon the original plea, and upon *this* allegation as reformed. But there being, in consequence of the death of Mr. Bedingfield, no evidence whatever upon the *material* parts of the original plea, namely, that propounding the instructions, the Court pronounced against these, and decreed a *general* administration to the sister Mrs. Popple.

The costs, on both sides, were directed to be paid out of the estate.

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*Term.*  
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v.
CONISON.

WARBURTON v. BURROWS and PINFOLD.

(On the Admission of an Allegation.)

1822.
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Term.
Bye-Day.

WILLIAM CHILLINGWORTH by his will, bearing date the 19th of February, 1811, executed in the presence of three witnesses, gave and devised certain leasehold and freehold estates, situate and being in the parish of St. Giles, Oxford, to his niece Mary Warburton. The rest and residue of his estate, after legacies of 500*l.* each, to his brother

An *unexecuted* will pronounced for—the presumption against it arising from the testator having delayed to execute it for two months after it had been fair copied for execution, being

held to be rebutted by circumstances going to shew, that it had received his final approval, and that such delay merely proceeded from a habit of procrastination—the testator having, at last, died *suddenly* by apoplexy.

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Mr. Thomas Chillingworth, and his brother-in-law Mr. George Warburton, the testator bequeathed to his nieces, the said Mary Warburton, and her sister Hannah Warburton (both of whom the will recites to be *then* living with him), in equal moieties.

In the month of November, 1821, the deceased gave instructions for a new will, the draft of which, being prepared, was read over to, and approved by him, and was fair copied for execution on the 21st of December following. The purport of this instrument was to substitute the testator's niece, Hannah Warburton, for her sister Mary, as devisee of the freehold and leasehold estates—to revoke the legacies of 500*l.* each to his brother and brother-in-law, Mr. Thomas Chillingworth and Mr. Warburton (*a*)—and to constitute his niece, Hannah Warburton, *sole* residuary legatee. But on the 20th of February following the deceased died, without having executed the same.

The present question arose upon the admission of an allegation, propounding this unexecuted will on the part of Miss Hannah Warburton. It was opposed by Messrs. Burrows and Pinfold, joint executors of the will of 1811, on the ground, *that* the deceased could not be presumed from the statement furnished by it, to have given the unexecuted paper his *final* approbation, as nearly two months elapsed between the time of the paper being ready for execution and the death of the deceased, without the allegation assigning, as they contended, any *satisfactory* reason for this delay.

(*a*) Quære, whether the latter of these, if not both, had not died in the interval between the two wills.

The allegation, in substance, pleaded,

1. That subsequent to the will of February, 1811, giving and devising as above, to wit, in February, 1812, the testator's niece, Mary Warburton, intermarried with Edward Bowle Symes, and that the said testator, upon occasion of that marriage, settled by deed upon his said niece the sum of 2000*l.*, payable within the space of twelve calendar months from his decease.

2. That the deceased, having a mind and intention to alter his will in favour of his niece Hannah Warburton, particularly in consequence of the provision made for her sister Mary Warburton, by deed, as above, gave instructions to his solicitor to prepare a new will for him, in or about the month of November, 1821—that his said solicitor prepared a draft will accordingly, which was read over to, and approved by, the said deceased, and was fair copied for execution on the 21st of the following December.

3. That soon after the said fair copy had been so prepared for execution, his said solicitor discovered, in conversation with the testator, that he had omitted to *specify* in his instructions a leasehold estate, situate in Broad Street, Oxford, which he had then lately purchased—whereupon the said testator caused the words, “and also all that my other leasehold tenement, &c. in Broad Street, Oxford,” to be interlined (in order to supply a similar omission) in the said fair copy or will. That after the said interlineation, the testator was two or three times apprized by his said solicitor, who was in the habit of occasionally calling upon him, that his will was ready for execution—that, in particular, he was so

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apprized one day about a fortnight before his death, when his said solicitor proposed to go home, and fetch the will, in order to its being then, presently, executed; upon which the said testator declared, that "there was no hurry," and that "he would execute the same another time."

4. The fourth article pleaded the deceased's sudden death, by apoplexy, on the 20th of February, 1822. And,

The fifth was the usual concluding article, praying the Judge to pronounce for the force and validity of the said unexecuted paper.

JUDGMENT.—Sir JOHN NICHOLL.

William Chillingworth, the party deceased, in this cause, made a will in favour of his nieces, Mary and Hannah Warburton. Mary, the elder, was *principally* benefited, though the sisters were *joint* residuary legatees. This was in 1811; at which *time*, it appears by the will, that *both* sisters were living with him. In the following year, however, Mary Warburton marries; upon which occasion the deceased settles 2000*l.* on her, by deed, payable within twelve months after his decease.

Now, this circumstance of the settlement, renders it highly improbable, that the deceased, at any time subsequent to it, meant to abide by the will of 1811. The *settlement* was a part execution of the benefit intended for Mary Warburton by the will of 1811. Still, the fact is, that no step is taken by the deceased to alter this will of 1811, until 1821, that is, for ten years, when a new will is prepared; and is actually copied out for execution, under circumstances which satisfy me that the testator's mind was, *at that time*,

fully made up to the provisions which it purports to contain.

But this paper is still unexecuted, after a lapse of two months, when the deceased dies, and the question is, whether the circumstances stated in the allegation are sufficient to repel the legal presumption *against* it, arising from this delay of the testator to execute this instrument. Upon the whole, I am inclined to think that they *are* sufficient. The interlineation as to "the leasehold messuage in Broad Street, Oxford," is evidence, that the testator adhered to the instrument up to *that* time. And although, when pressed to execute it about "a fortnight before his death," his declining so to do is a fact, from which, *per se*, the legal inference undoubtedly is, that he was *wavering* and *undecided*, still, viewed in connection with the circumstances of the case, and the deceased's declarations at the time, it suggests another inference:—these, I think, warrant the Court's imputing it to a mere habit of procrastination, and negative any suspicion to which his deferring its execution might otherwise give rise, that the instrument had not received his final approval. The deceased, upon that occasion, suggests no doubt, nor intimates any wish to reconsider—he merely puts off, to a more convenient season, the completion of the instrument—he says, "there is no hurry"—he "will execute it another time." Lastly, the deceased is pleaded to have died suddenly, by apoplexy, on the 20th of February, in the present year. Now, under these circumstances, considering the high probability that the deceased *should* alter his will, in favour of his niece Hannah, in consequence of the marriage-

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settlement upon her sister Mary—considering how deliberately these instructions were given and approved—considering how little this instrument wants of being a perfect will, and the *late* declaration of the deceased that he “*would*” render it such, although there was “no hurry”—I am disposed to hold, that the Court may conscientiously pronounce for the validity of the paper propounded, if the alleged facts are proved; on the ground, that the deceased had given it his final approval, and was only prevented from formally executing it, by the intervention of sudden death. Accordingly, I shall afford the party who propounds it, an opportunity of substantiating her case, by admitting this allegation.

Allegation admitted (*a*).

(*a*) This cause came to a final hearing on the 4th Session of Hilary Term, 1823—when the allegation being held to be proved, the Court pronounced for the unexecuted will.

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1st Session.

PREROGATIVE COURT OF CANTERBURY.

LEMANN v. BONSALL.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit respecting the validity of a nuncupative will. Nuncupative wills are not favourites with courts of probate; at the same time, if duly proved, they are equally entitled to be pronounced for with written wills. Much more is requisite, however, to the due proof of a nuncupative will than of a written one, in several particulars. In the first place, numerous restrictions are imposed upon such wills by the statute of Frauds^(a); the provisions of which must be, it is held *strictly*, complied with to entitle any nuncupative will to probate. Consequently, the absence of due proof of strict compliance with any one of these (that enjoining a *rogatio testium*, for instance^(b)) is fatal, at once, to a case of this species. But, added to this, and independent of the statute of Frauds, altogether, the factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative

The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in addition to all the several requisites to its validity, under the statute of Frauds, being duly proved, to entitle it to probate.

(a) 29 Car. 2. c. 3. s. 19.

(b) See *Bennett v. Jackson*, 2 Phill. 190. *Parsons v. Miller*, 1b. 194.

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wills are obviously attended—facilities which absolutely require to be counteracted by Courts insisting on the strictest proof as to the “*facta*” of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony. Above all, it must plainly result from the evidence, that the instrument propounded contains the true substance and import, at least, of the alleged nuncupation; and consequently that it embodies the deceased’s *real* testamentary intentions, though not so reduced into writing during his or her life as to be capable of being propounded as a written will. For unless the Court is morally certain, by pronouncing for it, of carrying these and no other into effect, it is obviously its duty not to give any alleged will, much less a nuncupative one, the sanction of its probate.

The deceased in this cause was Elizabeth Jones. She died a spinster somewhat advanced in years, in the service of Lord Lisburne, at Crosswood, near Aberystwith, in Cardiganshire, where she had lived, during the last nine years of her life, as housekeeper. The deceased had paid a visit to London in the July preceding her death, returning to Crosswood on the 4th of August. In travelling home she caught a violent cold, terminating in fever, by being exposed to a severe shower on the outside of a stage coach; of which she died in less than three weeks, namely, on the evening of the 18th of August. Her next of kin are a niece and a nephew, if indeed the latter be still living. For this nephew went to South America some years back; neither does it seem to be

known whether he is living or dead, nor whether, if the latter, his death did or did not precede that of the deceased in the cause. The niece of the deceased is Mrs. Lemann, the party opposing this will.

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Bonsall, the other party, who propounds it, and whom it purports solely to benefit, is a young woman of five or six and twenty. She is daughter of Lord Lisburne's game-keeper, at Crosswood, who lives in a cottage upon the estate, distant about half a mile from the mansion-house. This daughter Mary Bonsall was hired by the deceased, in the May preceding her death, to clean the house, and perform other menial offices, and in fact was the only under female servant, at Crosswood, from this period to that of the deceased's death, Lord Lisburne's family being abroad. She and a nurse attended the deceased during her last illness.

The words constituting the will propounded, are alleged to have been spoken in the Welch language. They are to this effect:—

“Listen you all what I Elizabeth Jones do say—it is my last prayer to give all I possess to the little girl here, Mary Bonsall, and I do not want to see any of my family.”

The principal witness to the factum of this will is William Davies, who is described as a farmer, aged fifty-five years, and whose evidence is in substance as follows:—After stating his intimacy with the deceased (whom he says that he used to mend pens for, and assist in writing to Lord Lisburne, &c.) and that he resides within three fields of the house at Crosswood, he goes on to depose, that “on Thursday, the 17th day of August, 1820, as he well remembers, having heard that the deceased was very ill, he and his wife, Jane Davies, went to see

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her at Lord Lisburne's house, at Crosswood, about seven o'clock in the evening. They went into her bed-room and found the deceased in bed. She appeared to be in great pain, and the deponent saw, by her countenance, or, at least, he thought from the appearance of it, that she was going to die—her little girl Mary Bonsall (so called it seems from her diminutiveness in point of size, and not as with reference to her age) was in the room with her, as also, the deponent thinks, was Jones the nurse. The deponent's wife shook hands with the deceased, and the deceased said that she was glad to see her; but she spoke with great difficulty, and appeared to be in a good deal of pain, and Mary Bonsall was cleansing her mouth from the phlegm, a considerable quantity of which appeared to be about her mouth, and to impede her utterance. The deponent, seeing the situation of the deceased, did not intend to speak to her; and he accordingly took a chair, and sat down in a corner of the room; but, in a short time, the deceased beckoned him to her, and gave him her hand, and then, addressing the deponent and his wife, desired them to remember her in their prayers—adding some words of ejaculation in the Welch language. The deponent asked her if she had any relations, and, upon her answering “a niece and nephew,” inquired whether she would permit him to write to either; but the deceased replied, that she did not wish to see either of them. She also said something to the effect, that the little girl (meaning Mary Bonsall) was the only person that she wanted to see. The deponent then left the room, and, when just outside the door, called to his wife to accompany him home, as the harvest people would want their supper. The deceased asked what they

were saying, and, on the deponent's wife saying that she was wanted to go home, the deceased made her promise to see her again the next day. Just then the deceased or Jones (the deponent forgets which) called to the deponent to come back; and, on his returning, the deceased, in the presence of deponent, his wife, and Jones the nurse, expressed herself to the following effect:—"Listen you all, &c." This deponent adds the Welch words made use of by the deceased, as nearly as he can recollect them. He says "that the deceased uttered these words in a very serious manner, and apparently quite of her own accord, and in a much firmer tone than any thing she had before said on that evening; and the deponent verily believes that she seriously meant them to remain as her will, and that her property should go as thereby expressed. She did not say any thing else to the persons present, in allusion to her will, that the deponent remembers; but he understood that, by the words deposed of, she meant to desire him, and the other persons present, to take notice, and remember that what she then said was her will, and to *bid* them bear witness that it was so." He further says, that "he verily believes the deceased to have been, at the time of which he has just deposed, of sound mind, memory, and understanding. He saw nothing to the contrary—he did not observe a single word amiss that she said, though she was very ill as to bodily health—she seemed perfectly to know, and understand, what she said and did." This witness speaks to nearly the same effect, upon interrogatories which have been addressed to him on the part of Mrs. Lemann—and is confirmed, in substance, by the other witnesses, Jane Davies

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(his wife) and Jones, who duly *attested* the words so uttered by the deceased, after the same had been reduced into writing by the deponent Davies himself, about breakfast time the following morning.

Such is the sum of the evidence tendered in support of this instrument; and I think that it results from that evidence, if not *wholly* discredited, that it is a good nuncupative will, *any thing in the statute of Frauds, at least, notwithstanding*, provided the words "listen all of you what I, Elizabeth Jones, do say," are to be deemed a sufficient "*rogatio testium*" within the statute. The Court is by no means prepared to say that they are *not* to be so deemed: but this is a point upon which it would be understood to decide nothing, as the question respecting the validity of this will may be satisfactorily disposed of upon other, and different, considerations. For when the Court looks, attentively, to the evidence, of which the sum has already been stated, to the *factum* of this instrument, it is bound to pronounce, especially as contrasted with the adverse testimony, of which I shall say a word, presently, respecting the deceased's *capacity* at the time of the alleged nuncupation, that it is, in the highest degree, unsatisfactory, and that in the most material particulars.

1. And, first, that the correct substance of the words spoken by the deceased, admitting her to have uttered something of the sort, is embodied in the instrument now propounded to the Court, is very questionable upon this evidence. They are uttered but once—no repetition of them is demanded—no explanation is either given or required. No questions are put, such as "were these your words?" or

"do I rightly understand you?" or "are such your wishes with regard to the disposal of your property?" No pains, in short, are taken to sift and probe the deceased's intentions on this head—no precaution of the kind is pretended to have been used. The deceased, however, to say nothing, at present, as to her *mental* capacity, was, at this period, in a state of *bedity* infirmity, which must be presumed to have rendered it difficult to collect the true import of what fell from her at all; much more that of a period of this length, only *once* enunciated. Her dissolution, then rapidly approaching, actually took place within little more than twenty-four hours of that time; and Davies, it will be seen, admits that she "spoke with great difficulty," and that Bonsall was employed in cleansing her lips, from time to time, of phlegm which collected about them so as to "impede her utterance." And yet the omission, or misapprehension, of a single monosyllable, would alter the whole tenor and effect of the will, *as* propounded. For instance, instead of "all I possess" *absolutely*, read "all the *clothes* I possess," or "all I possess *here*," and the whole effect of the nuncupation is different. It must be admitted, however, that either of these would be a more *probable* bequest from the deceased to a girl in Bonsall's condition, than that of her whole funded and other property, estimated at 15 or 1600*l.*, the savings of a life of parsimony. But the Court, I have said, is bound not to pronounce for a nuncupative will, under any circumstances, without being assured that it is the true substance and import of the alleged nuncupation which presents itself to it for probate to a moral certainty—a species of assurance on this head,

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which, I am bound to say, is not afforded to it by the evidence in the present case by any means.

And here I may further observe by the way, that so far as the probabilities of the case, *in general*, are concerned, these are decidedly hostile to the will. The intention of the deceased to make *any* will is rendered very unlikely by the circumstance, that although her illness was gradual, and she was early impressed with a sense of its probable termination, yet still that she neither expressed nor hinted at any wish to dispose of her property, as by will, at all. And her intention of making a will to the effect of that propounded will appear less likely still, when I say that, independent of proofs of regard for Mrs. Lemmann evinced by the deceased during her late visit to London, the evidence satisfies me that she had a strong dislike to the Bonsalls, generally, although perhaps slightly partial to this girl, Mary Bonsall, for services rendered to her in her last sickness. The circumstance so much relied on of her declining to send for Mrs. Lemmann in her last sickness, she, Mrs. Lemmann, being a wife, a mother, and resident 200 miles off, in London, might have proceeded from a feeling the very contrary to that which it has been ascribed to, namely, disaffection to her niece.

2. But, secondly and principally, how does the evidence stand with respect to this deceased's capacity at the time of the alleged nuncupation? Without going, minutely, *into* the evidence on this part of the case, it will be sufficient to state the decided impression of the Court as to its general result.

The nuncupation, it will be remembered, is alleged to have taken place on the evening of the 17th of

July, the deceased having died on the following evening. Now it is proved completely, to my satisfaction, by the evidence of four witnesses above exception, of Mr. Williams's, senior and junior, the apothecaries, of Mr. Jones, a clergyman, who attended to pray by her on the evening of the same 17th of July, and of M'Cullock the butler, who was in the house with the deceased during all her sickness, and positively deposes to having seen her four or five times in the course of that day, that at the time of the asserted nuncupation the deceased was delirious and incapable. Williams, senior, deposes to professional visits at Crosswood, on Monday, the 14th; Tuesday, the 15th; and Wednesday, the 16th of July; and to finding the deceased, on the last of these days, in a state of at least incipient delirium. This deponent, being otherwise engaged, did not see the deceased *after* the 16th—she was visited on the 17th and 18th by his son, and fellow deponent, Williams, junior, who speaks of her, upon both those days, as thoroughly delirious and incapable: Williams, junior, and Mr. Jones, were with the deceased, together, on the evening of the 17th, a very short time only before the asserted nuncupation; and they concur in representing her in the state which I have just described, at that time, in which they are confirmed by M'Cullock. The witnesses last named, I should observe, are examined upon an allegation given in by the next of kin, pleading the deceased to have been in a state of mental incapacity for about four days before, and down to the time of her death. And yet not only Davies and his wife, and Jones the other witness, depose (upon Bonsall's allegation) pretty unreservedly to her capacity on the evening

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of the 17th, the time of the nuncupation; but this last, Jones, who nursed her *through* her illness, ventures to swear, in answer to an interrogatory, that the deceased at *no* time during her illness appeared to her to be insane. She says "there did not seem to be any thing the matter with her mind prior (at *any* time prior, that is) to her death. Respondent never saw her delirious—nor ever heard her talk in a wild or irrational manner."

Now this evidence on Bonsall's part, as to the deceased's capacity, is not only plainly and palpably untrue, but it induces a strong suspicion that her case is a fraudulent one altogether. And this suspicion is confirmed to my mind by the following consideration:—The deceased, who is represented on the evening of this 17th, as breaking forth into this nuncupation, just as Davies and his wife, with whom she had no particular intimacy, had taken leave, all of a sudden, and without any previous intimation, is made to express herself, at the same time, in a manner highly technical; even reciting her name—"Listen you all what I *Elizabeth Jones* do say." But that the deceased should have practised this formality of a *rogatio testium*, unless previously suggested to her, is exceedingly unlikely. How was *she* to become aware of any "*rogatio testium*" being necessary? Davies's knowledge of this, on the contrary, is easy enough to be accounted for. He, it seems, was a person of some experience in this matter; for he says, that his mother had made a nuncupative will, which "*came to nothing*," by reason of a certain informality. He therefore might, well enough, be acquainted with the several formal requisites to the validity of a nuncupative will; and

the phrase just recited is much less likely to have fallen from the deceased, *in the manner represented*, than to be the result of an attempt on Davies's part to bring this case within the statute of Frauds, as to a "*rogatio testium*," in my view and apprehension of it.

I pronounce therefore against this nuncupative will, as not satisfactorily proved. And I think that I am bound, as a check upon future attempts of a similar nature, to accompany this sentence with a decree for costs against Bonsall, even although she is suitor in this cause *in forma pauperis*. At the same time I reserve this question of costs for further order, on taxation; then to be proceeded in, namely, as to the pauper's liability—should the other party; that is, think it worth while to tax her costs, and to apply for a monition against Bonsall for payment(a).

(a) On a subsequent Court-day, this cause was called, "on taxation of costs"—but the proctor for Mrs. Lemann not pressing it, no order was made by the Court, and the question as to the pauper's ultimate liability consequently merged.

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ANTROBUS and BOOTH v. NEPEAN.

(On the Admission of an Allegation.)

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SIR EVAN NEPEAN, late of Loders, in the county of Dorset, was the party deceased in this A letter written by the deceased to his solicitor, respecting certain alterations to be made in his will, two months before his death, propounded as a codicil—allegation propounding it rejected; it being held—that the letter did not argue the deceased to have fully made up his mind as to the proposed alterations, even at that time—and that, if it did, still the presumption of abandonment arising from a lapse of two months, without any act done, was not effectually rebutted by the facts pleaded.

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cause. In the year 1812, the deceased, who had been appointed Governor of Bombay, left this country for India; prior to which, however, he made and executed his will. He returned to England in 1821—and early in the following year, 1822, he wrote a letter from an hotel in London, at which he was then staying, to his solicitor, Mr. Hutchinson, of Lincoln's Inn, containing various instructions for alterations in his said will, and directing his solicitor to prepare a draft of a new will, conformable to such instructions. This letter is dated 7th of February, 1822. The testator, shortly after, went out of town, to his seat at Lodors, where he died, on the 8th of October following, after an illness of only half an hour, just as he was about to leave Dorsetshire for London.

This letter to Mr. Hutchinson was propounded as a codicil to the deceased's will, by Sir Edmund Antrobus, and Mr. Booth, the executors—and was opposed on the part of Sir Molyneaux Hyde Nepean, Baronet, the eldest son of the deceased, and the residuary legatee named in his will.

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The letter propounded was as follows:—

“ My dear Sir,

“ I send you my will. I find I cannot make all the arrangements without consulting Lady Nepean; but in the mean time you will be so good as to consult the main point, which is, to leave all my landed estate to my son Molyneaux Hyde, and to his son, for their lives (not allowing them, when the latter shall be of age, to cut off the entail), as I mean that the estate shall descend to their heirs, and continue

in my family as long as the law will admit of my entailing it.

" My daughter to have 6000*l.* at my death. She has 1000*l.* of her own—to make - 7000*l.*

" Frederic to have 3000*l.*, which, with 1000*l.* already given him in India, will make - - - 4000*l.*

" William to have 2000*l.*, which, with upwards of 2000*l.* paid for his commissions, will make - - - 4000*l.*

" Evan to have 3000*l.*, which, with the next presentation to Loders and Rotherhampton livings, will be more than equal to - - - 4000*l.*

" My wife to have an annuity of 1200*l.* per annum—on her second marriage, to be reduced to 500*l.* per annum. The house, furniture, &c. as in the will, for her life, if she remains single. If not, to my eldest son.

" The money I have in India, and in the public securities, will enable me to pay the fortunes of my younger children.

" You shall hear from me on my arrival in Dorsetshire, before you can have made any considerable progress in the draft.

" Your's, very sincerely,

" EVAN NEPEAN."

" Thompson's, 7th February, 1822.

" Julius Hutchinson, Esq."

The allegation propounding this paper, in substance, pleaded—

That Sir Evan Nepean, prior to going out to Bombay, in the year 1812, made and executed his

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last will, bearing date on the 12th of March in that year; whereby he settled and limited his *real* estates; and provided for his younger children out of his *personalty*, which was then inconsiderable—that on his return from India, in 1821, with his *personal* property considerably increased, he became desirous of augmenting the provision made by his said will for his younger children—that such intentions were embodied in a letter sent by the deceased to his solicitor, Mr. Hutchinson, dated in February, 1822, accompanying his will; and directing his said solicitor to prepare a *draft* will, pursuant to the instructions contained in the said letter—that the said solicitor, on the receipt of the said letter, *began to prepare* for making the draft of a new will, by perusing and abstracting the will of the deceased, and making certain pencil memoranda and references (still apparent) on the margin—that after his return into the country, the illness of his wife, Lady Nepean, whom he had expressed a wish to consult on certain points, together with continual engagements respecting some trials at the Dorsetshire assizes, in which his interests were involved (as also his being *sheriff* of the county), had detained the said testator in the country, and prevented him from completing his intended will within the time originally proposed; *but*, “that he did not, at any time, previous to his death, depart from his intention of making a new will, and of providing for his younger children to the extent expressed in his letter to his solicitor;” and that he “meant and intended this letter to take effect, in case of his death before his new will was completed.” Lastly, it pleaded, *that* the testator was actually preparing to come to town,

when he was suddenly taken ill, and expired, at Loders, after an illness of about half an hour, on the 8th of October, 1822.

The admission of this allegation was opposed, on the part of Sir Molyneaux Hyde Nepean, as not stating facts sufficient, if proved, to sustain the alleged codicil.

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## JUDGMENT.

Sir JOHN NICHOLL.

In order to sustain this alleged codicil, the Court must be satisfied that it expresses the deceased's *fixed* and *final* testamentary intentions. In these events, it will be the duty of the Court, ultimately, to pronounce for it—for it may *then* fairly presume the deceased to have been prevented by sudden death *alone*, from expressing those intentions in a formal testamentary shape.

And here, the first question is, how far can this letter be taken to express, upon the face of it, the writer's *fixed* testamentary intentions?—in other words, is the paper propounded such as ought, *in itself*, to satisfy the Court, that the testator's mind, *at the time when he wrote it*, was *quite* made up to the bequests which it purports to contain? Now, of *this* I entertain some doubt. The letter is a mere letter of directions, and instructions—liable, and likely, to be varied, if not altogether departed from, on the *draft* will being, as proposed, submitted to the writer—and as to parts, at least, of which, it should seem, from the wording of the letter, that the writer was, even then, hardly *quite determined*. He concludes with promising “further advice” in the matter to his solicitor, *on his arrival* in Dorsetshire, and postpones its final arrange-

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ment—that is, as I understand it, a delivery of *final* instructions, or directions, for his will—till he has consulted Lady Nepean. It has been argued, indeed, that the testator's mind was quite made up, as to these legacies to his younger children—it was only the settlement of his *real* estate as to which his solicitor was to look for “further advice”—it was *this* only as to which Lady Nepean was to be consulted. But this argument has no foundation, that I can perceive, either in the circumstances of the case, or in the words in which the letter itself is couched. It is, to say the least, full as likely that Lady Nepean was to be consulted upon the provision to be made for the younger children, out of the *personalty*, as it is that she was to be consulted about the settlement of the *real* estate.

But admitting, for argument's sake, that this letter expresses the deceased's *fixed* testamentary intentions as to these legacies to his younger children *at that time*, will it *necessarily* follow that they were also his *final* ones? By no means. On the contrary, under the circumstances of this case, the law *presumes* them, however firmly *once* entertained, to have been abandoned by the testator—and the Court, I am afraid, will be bound to *conclude* so, unless that legal *presumption* be repelled; which, whether it is, or is not, by the facts pleaded in this allegation, is the real question to be determined.

Now, considering how highly probable it is that the deceased fully intended *some* further provision for the junior members of his family out of his increased *personalty*, the Court is sorry to say, that the facts here pleaded would, in its judgment, *not*

have the effect of repelling this legal presumption—the result being, that the utmost proof of which this allegation is capable, would fail to sustain the paper propounded in the cause. The allegation certainly *pleads, that* “the testator, at no time, departed from the intention of benefiting his younger children to the extent expressed in the (alleged) codicil.” But a mere averment to this effect is insufficient—there must be facts and circumstances in proof of that averment. If it be asked, of what nature? I answer—of a nature to shew that a new will, embodying the bequests expressed in this letter, was in progress at the time of the testator’s sudden death; so as to warrant a conclusion that it was *only* finally arrested by that event. The parties propounding the paper are fully aware of this, as appears by facts of the *kind* to which I am adverting, being alleged in the plea—the adversity of their case is, that these facts, though right *in kind*, are still unequal to the effect sought to be produced. The illness of Lady Nepean, and Sir Evan’s several avocations, public and private, in Dorsetshire, are circumstances much too loose and vague to account, satisfactorily, for no step having been taken in this matter during the long interval of eight months, which occurred between the date of this letter, and the death of the testator—the more especially, from the testator having promised to communicate further with his solicitor on the subject, immediately upon his arrival in Dorsetshire. Had that promise been fulfilled, and had a correspondence ensued, inferring, to a late period of his life, the testator’s deliberate approval of, and fixed determination to abide by, the

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original instructions—could even verbal declarations made by the testator, have been pleaded and deposed to, that now, at length, at the termination of the assizes at Dorchester (which, it is observable, must have been, some time, over), he was going to London, in order to execute his will, drawn up pursuant to directions already given to his solicitor—in either of these events this case might have presented itself to the Court with a different aspect. But, as it is, the Court, with whatever regret for a reason already expressed, is bound to pronounce that the utmost proof of which this allegation is capable, would fail to rebut its presumed abandonment in law, and, consequently, would fail to sustain, the paper propounded—under which impression it has no choice but to reject this allegation.

*Allegation rejected.*

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LAVENDER and CHURCHILL v. ADAMS.

*(On the Admission of an Allegation.)*

Alterations written by the testator in pencil on the margin of his will, held to be, in themselves, *deliberative*—also held, not to result from the facts pleaded that the testator was prevented from rendering them *operative* in themselves by any extrinsic circumstance—consequently, allegation propounding such, rejected.

**T**HIS was a business of proving, in solemn form of law, the last will and testament, *without* certain alterations in pencil appearing upon the face thereof, of Richard Adams, late of the parish of Claines, in the county of Worcester, deceased; promoted by John Perks Lavender and James Churchill, the executors named in the said will, against Mary Adams,



widow, the relict of the said deceased, and a legatee principally interested in the said pencil alterations.

This will, altered as above, (i. e. *with* the said pencil alterations) was propounded in an allegation tendered on the part of a widow, pleading to the following effect :—

1. The first article pleaded that the deceased died on the 30th of August, 1822, having first made and executed his last will and testament, to wit, on the 21st of May, 1821—that the said will at that time had none of the alterations in pencil now appearing on the face of it—that it was shortly after sealed up in an envelope, and delivered to the said deceased, and continued from such time in his possession and custody, till he died.

2. *That* the deceased, meaning and intending to make certain alterations in his said last will and testament, made and wrote, with his own hand, the several alterations in pencil now appearing on the face of it; but at what time the party proponent is unable to set out—and when made, deposited, and locked up his said will, so altered, in a drawer in his bureau, the key whereof he himself kept.

3. *That* in or about the month of June, 1822, the said deceased informed Mr. James, his solicitor, who had prepared his said will, that “ he should have occasion, shortly, to make some alterations therein, and that he would call upon him for that purpose;” but that he, the said deceased, never did so call on the said Mr. James.

4. The fourth article pleaded *that* the said will, so altered, was found locked up in the drawer of the deceased’s bureau as aforesaid, the day next following that upon which he died—that it was in the envelope in which it had been originally sealed up,

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but the seals whereof had been broken, in order to take it out; and that the said envelope had not been re-sealed.

5. The fifth article pleaded merely the several pencil alterations to be of the true and proper hand writing of the said deceased.

6. The sixth and last was the general concluding article.

The present question arose upon the admissibility of this allegation, which was denied on the part of the executors, as not disclosing a case, which, if proved, would justify the Court in pronouncing for the will, *with* the said pencil alterations, as propounded by the widow.

## JUDGMENT.

Sir JOHN NICHOLL.

It is to be taken for granted that these alterations were made by the deceased himself—the question is *quo animo*, or, in other words, what do the alterations, *themselves*, import; and are *they* to be taken as final or deliberative? If they are to be taken, in themselves, as final, I need scarcely say that it will be the duty of the Court, in the end, to pronounce for them, *although written in pencil*—that being an argument, but still, as we all know, not by any means a conclusive one, of their being deliberative. This allegation, in that case, is clearly admissible. But if these alterations, *in themselves*, are to be taken as *deliberative*, it then becomes a question, whether the facts pleaded argue the testator to have fully made up his mind to *render them final*, and to have been prevented from doing so only by some extrinsic circumstance: and the admissibility, or the contrary, of the plea, in this last case, will depend on that question being answered affirmatively, or in the negative.

Now I think that, upon the face of these papers, coupled with what appears of their history in the allegation, these alterations can, *in themselves*, only be taken as deliberative. It is hardly possible to suppose that the deceased meant them as any thing more than preparatory to *final* alterations. The will so altered, to be sure, was re-placed in its envelope from which the testator had taken it, for the purpose, it is to be presumed, of noting these alterations; but it is a circumstance by no means immaterial that this envelope remains open, and is not re-sealed. Again, the testator is pleaded to have told his solicitor, that "he should have occasion, *shortly*, to make some alterations in his will, and that he would call upon him for that purpose." His not having done so raises a presumption—either that he had changed his mind, or had never finally made it up, in this respect—either supposition alike fatal to the case set up in this allegation. Nor is this presumption at all, in effect, rebutted, by the circumstance of the *proposed* alterations (for such only I can deem them) being noted in pencil on the margin of the will: for that the deceased contemplated *finally* altering his will by the agency, and with the assistance, of the professional gentleman who at first prepared it, is obvious from the plea.

These alterations, then, being *not* in themselves final, it remains to consider whether it can be inferred from any fact or circumstance which is *here* pleaded that the deceased fully meant and intended to render them final, and was only prevented from so doing by some extrinsic circumstance. The facts pleaded justify neither inference. Of the *proposed* alterations, some are material, and might re-

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quire deliberation. The very first, for instance, the substitution of an annuity of 200*l.* to his widow, in lieu of the interest (much less in amount) of his funded property. Nothing is pleaded, however, tending to shew either the probability of such a substitution in itself, or that, probable or not, the deceased had ever *finally* resolved upon it. Nor, again, is there any foundation whatever laid in the plea for an inference, that the deceased was prevented from completing this, and the other proposed alterations, by any *extrinsic* circumstance. *Non constat* when they were noted in pencil on the margin—they might have been, soon after May, 1821, when the will bears date—they probably *were*, at least as early as June, 1822, when the conversation between the deceased and his solicitor Mr. James, relative to some alterations in his will, is pleaded to have occurred. But the deceased did not die till the 30th of August in that year; during the whole of which interval he was fully capable, for any thing stated in this plea to the contrary, of making these alterations final, and operative *in themselves*, if so disposed. The deceased is not pleaded even to have died *suddenly*. Not that his *sudden* death, standing alone, would have entitled these inchoate and imperfect alterations to probate as parts of his will—in order to have produced this effect, it must further have been shewn that they were in progress towards being made perfect, and complete, at that time. Upon all these several considerations I reject this allegation—and decree probate of the will, as originally executed, and *without* the pencil alterations now appearing on the face of it, to the executors.

Allegation rejected.—Costs directed to be paid out of the estate.

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CONSISTORY COURT OF ROCHESTER.

BEST v. BEST.

JUDGMENT.

Dr. SWABEY.

This is a suit brought by Elizabeth Best, the wife, against James Best, her husband, for a separation *à mensâ et thoro*, by reason of cruelty; in the course of which suit the husband has not only pleaded, *responsively*, to the original complaint, but has also, in the same allegation, produced a distinct substantive charge—that of adultery—against the original complainant. This adultery is alleged to have been committed within a few weeks of the marriage, but still not to have come to the husband's knowledge until after the wife had been compelled, as she pleads, to quit his house for the safety of her person, in consequence of his violent and unmerited ill treatment of her.

This allegation of the husband was offered at a later period than might have been expected from the nature of its contents; but the Court, with some reformation, thought fit to admit it. Indeed the only plausible objection to its general admissibility was technical merely—arising upon a doubt suggested, whether, in strictness, it be competent to the husband, sued for restitution of conjugal rights, to charge adultery against the wife, without (if not instituting a separate (cross) suit, still at least) first taking out a separate citation, returnable in the same suit; calling upon the wife, distinctly, to answer to that charge. The necessity for either, however, ap-

Suit by the wife for a divorce by reason of the husband's cruelty—adultery charged by the husband, and a divorce prayed by reason of the wife's adultery—both complaints dismissed, and upon what principles.

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peared to me to have been formally dispensed with, by a series of decisions in these Courts.

Anciently, I believe it to have prevailed, that in all matrimonial suits wherein adultery was intended to be offered (especially where to be made the foundation of a prayer for divorce) on behalf of the defendant, a cross suit, or at least a citation of the plaintiff, to answer to that charge, returnable in the original suit, was held to be requisite. This may, partly, for instance, be collected from the following note of a case in the Consistory Court of London; of the 8th of November, 1752. It is anonymous; but the date is sufficient for the present purpose, and is in these terms:—

“It was made a question between Caesar and Major,” (two proctors of that time) whether, in an original suit, brought for restitution of conjugal rights, there could be a divorce? Caesar said, he had consulted *all* the registrars, and they had answered in the negative. Dr. Paul, Dr. Penfold, and Dr. Jenner, as *amici curiæ*, said, that adultery was pleadable, in bar, in a suit for restitution of conjugal rights, but that still, in their apprehension, let it be ever so well proved, it could lay no just foundation for a sentence of divorce—the original suit being for restitution. *Curia advisare vult*. But on the 17th of November the Judge said, that, “in a suit for restitution of conjugal rights, a marriage may be pronounced for; and that in such a suit adultery may not only be pleaded in bar, but a divorce may be had in consequence of it, as was *solemnly determined* by the Delegates in Sir George Savile’s case.”

By this I do not take the Court to have meant, that, in the case of Sir George Savile, a divorce had actually been granted; but that the Delegates had solemnly affirmed, in that case, the principle of adultery being pleadable in a suit for restitution of conjugal rights, not merely in bar, but for the further purpose, if established in evidence, of founding a sentence of divorce. For I believe the fact to be, that neither the Court of Arches, nor the Court of Delegates, acceded to the husband's prayer for a divorce in that case, owing to a defect of proof (a)—which judgments were afterwards affirmed upon a commission of review.

Sir George Savile's case, however, which began in 1740, was not the first case in which this doctrine

(a) was whether not, in part at least, owing to a *constructive* condonation of the wife's adultery by the husband? At least, as it has been stated by Lord Hardwicke, it tends to influence the discretion of the Court in granting a commission of review in the case of *Savile*. The sentence is, therefore, one which tended to establish a principle of great importance to future cases, and which had not before been established by any decision in this country; viz. that forgiveness of adultery may be collected from facts and circumstances, so as to bar the husband from the right of divorce. This is the law of the civilians and canonists; but he 'Lord Hardwicke' thought that it required *more* consideration before it should be admitted into the law of England." [See 4 Ves. jun. 202.] The *other* circumstances were, 1. That the weight of evidence was against the sentence; 2. That the question had only been once heard and determined; for the appeal to the Delegates was brought upon a preliminary point only, when the Delegates retained the cause; 3. That the party in possession of the sentence *could* be no sufferer, in point of costs, in consequence of further litigation, as the expence of *all* proceedings in the cause necessarily fell upon the husband—the applicant for a commission of review.

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was held. It was held for instance in the cause of Dynely and Dynely, which is still more apposite to the question at issue in this cause in 1732. In Dynely and Dynely the wife commenced a suit against the husband for separation by reason of cruelty, in the Consistory Court at Hereford; and the husband having appealed (on a grievance) to the Arches, he there brought in an allegation charging the wife with adultery. Now this allegation the Dean (Dr. Bettesworth (a)) admitted; and *further* proceedings were had in the *original* suit. True it is that, either *ex abundanti cautela*, or for some other cause, the husband's proctor *afterwards* prayed a citation by letters of request to be granted to him against the wife; under which he appears to have proceeded, as if in a cross suit. Still, however, Dr. Bettesworth's having admitted the allegation of the husband charging the wife with adultery in the *original* suit, is a distinct affirmance, by the Court of Arches, of the principle said to have been afterwards solemnly determined by the Court of Delegates in Sir George Savile's case. The husband's cross suit in Dynely and Dynely, it may be observed, was appealed, on a grievance, from the Court of Arches to the Court of Delegates; where the husband, ultimately, I think, obtained a sentence in his favor; though this does not appear from the process, which is all that I have been able to consult. Nor can I say to a certainty what finally became of the wife's original suit, the cause of cruelty; but am inclined to think that it dropped, after numerous continuations, without proceeding to a sentence.

(a) Dr. Bettesworth the elder. See the next note.



This question, however, seems to have been again mooted before Dr. Bettesworth (*a*), in the cause of Matthew and Matthew, in 1769—a proof, this, of the difficulty of satisfying all minds as to neither a cross suit, nor a separate citation returnable in the same suit, being requisite in these cases. A citation having been taken out by the husband against the wife, in that case, in a cause of restitution of conjugal rights, Stevens (a proctor) appeared for the wife, and prayed a libel, which was given in. In answer to that libel he confessed the marriage, but otherwise contested suit negatively; alleging further, in bar, commission of adultery by the husband; against whom he prayed, at the same time, a citation, to answer to his wife in a cause of divorce by reason of adultery. Torriano (the husband's proctor) objecting, this matter of objection came to a hearing, “on the petition of both proctors.” The Court said, “the question of the day seems to be a question of mere form; and therefore the registrar has been directed to look for precedents. He has found one of “*Bently and Bently*,” where the Judge decreed a citation as prayed by Stevens in this cause; observing, however, that the adultery might be pleaded, and that being proved, a divorce might be had just as well without it. He therefore (Dr. Bettesworth) was of opinion that Mr. Stevens might

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(*a*) Dr. Bettesworth, the younger, as appears by the date; the elder Dr. Bettesworth having died in 1751. This Dr. Bettesworth, son of the elder, (both named John) never rose to be Dean of the Arches, but was Chancellor of London—so that the cause of Matthew and Matthew was depending in the Consistory Court of London, at least, when this question was mooted.

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proceed either way." Stevens, upon this, prayed a citation against the husband in a cause of adultery, agreeable to the precedent in the case of Bently and Bently. That a cross suit, or separate citation, is *necessary*, however, under such circumstances, has never been asserted, that I am aware of, from that time to the present—and the practice of either, thus held to be optional, appears, from that time, to have been finally dispensed with.

I should not have referred to these authorities in this stage of the cause, but that, having omitted to do so when the admissibility of Mr. Best's allegation was debated, as entertaining, *myself*, no doubt upon this subject, it has again been pressed upon my observation, in the course of the hearing, by Mrs. Best's counsel, that the recrimination here introduced by the husband (in the *original suit*, namely, and under no *citation* of the wife), is by a different species of charge. So it is; but to found either the one, or the other, the basis is the marriage—and the parties are the same.

The marriage between these parties, Mr. and Mrs. Best, which is both proved and confessed, took place on the 20th of December, 1817; certainly under circumstances, seemingly, not the most auspicious. Yet, if they mutually agreed to accept each other as husband and wife, the duties of that relation became obligatory on both. It does appear, to my satisfaction, that Mr. Best was desirous to treat his wife with kindness and indulgence. This is evinced by his having expended large sums for her gratification in various instances—in particular, he purchased diamonds, and other personal orna-

ments, for her, to the amount in value of 1400*l.* or 1500*l.* Mrs. Best had a new carriage built to her taste—there was a saddle-horse kept for her use; and a servant, whose business it was exclusively to attend upon her. It would be difficult, indeed, to ascribe this marriage to any thing but attachment on Mr. Best's part. But the wife's paramount object was avowedly different. She looked merely to the husband's fortune; and more especially to procuring from it a settlement *by deed*, under which she would have been amply provided for, in the event of her surviving, or ceasing to cohabit with, him, let her conduct, in the interim, have been what it might. A provision *by will* she regarded, in her own language, as “nothing at all,” having learnt, in whatever school instructed, the difference between a revocable and an irrevocable instrument. Failing to obtain this latter from her husband by fair means, she appears to have thought herself able to extort it; rashly calculating upon obtaining that end by practising every species of annoyance upon him—by absenting herself from his house, repeatedly, against his will; and by rendering his habitation, during her presence in it, a constant scene, not merely of verbal altercation, but actual personal conflict. Within three weeks, for instance, from her marriage, she goes to Dover (stopping, in the way, at Canterbury, under circumstances to which I shall presently have to advert), for the purpose of trying to effect this favorite object of a settlement, through the medium of Mr. Kennett, an attorney at that place. It is from Dover, and at this time, that she addresses the two letters annexed

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to Mr. Best's allegation, marked B. and C. (a), thereby making the experiment of declining to return to his house at all, unless he accedes to her terms of a settlement—an experiment, however, which she found to fail. Mr. Wickham, who is clerk to Mr. Best, and apparently much in his confidence, but whose evidence the Court can safely rely upon, says, that within a few days only of the marriage, he had some conversation with her upon the subject of a *will*, which Mr. Best had prepared to execute. She objected to it, saying, she ought to have a *settlement*. [The deponent had previously said, that, upon several occasions, immediately after the marriage, he had heard Mrs. Best urging Mr. Best to make a settlement upon her—to the single object of obtaining which, her conduct, altogether, appeared to be directed]. The deponent observed

(a) These letters are as follows :—

(B.) Dover, January, 1818, from the York Hotel.

My dear Husband,

It gives me plesure to call you so. I am very sorry I am obliged to stay from you so long; but you know it is no more than is proper for me to se myself wrighted; and I am sure you will do Every thing that is honouribley and gust for me. My dear Sir, as I was short of money when I left you, I shall be obliged to you to send me sum by Return of Post, to pay the expences of the Inn. I am, my dear husband,

Your's, for ever,

E. BEST.

(C) from the York Hotel, Dover, Jaenery 10th, 1818.

Dear Sir,

I am extremely sorry to inform you, that I cannot Return Back to you, unless you make me a settlement from the day of marrege; and I shall wait here until I heare from you. I am, Sir, your's truly,

E. BEST.

to her, that a settlement was what she ought not to expect—that she ought to be grateful to Mr. Best, for having raised her to his station in life, and to be satisfied with a provision made for her by his will, the amount of which, of course, would, and ought to depend upon her conduct. Mrs. Best replied, that a *will* was nothing at all—she married Mr. Best for a fortune, and she ought to have a *settlement*—and, on the deponent again adverting to the advantages she had acquired by her marriage, she added, that “she was a young woman, and Mr. Best was an old man.”

Her witness, Mary English, by whom Mrs. Best was accompanied, when she finally left her husband, in August, 1819, and who had lived in her service for the fourteen months preceding, speaks much to the same effect as Mr. Wickham, upon this head, in answer to interrogatories which have been addressed to her on behalf of Mr. Best. On the 12th and 13th interrogatories, she deposes to Mr. Best’s refusal to make a settlement upon his wife, being the source of constant altercation; and to her gross abuse of him, in consequence of that refusal. She deposes to this, *in fact*, being “the principal cause of their quarrels.” She has heard her say, that she would not have lived with him, if she could have got a settlement, and that “he might be sure she did not marry him for love.”

Of the habits and character of this complainant, *generally*, the history afforded in the evidence is, I am sorry to say, most unfavourable. Of her habitual intoxication, and gross immodesty, both verbal and actual, it would be disgusting to furnish the details—not merely as spoken to by Holt, and But-

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terfield, respectively servants in the family, and witnesses on the part of *Mr. Best*; but as admitted by her own witness, *English*, and confirmed, so far as they go, by several of the exhibits proved to be in her own hand-writing. *Mr. Wickham*, too, deposes to "*seldom seeing her, towards evening, that she was not intoxicated.*" He says, that her manners, on those occasions, were full of levity and impropriety—and that her language was "very bad," and such as he, as a family man, "endeavoured to avoid attending to as much as possible." The evidence of every witness in the cause upon whom the Court can place any reliance, is confirmatory of this.

To the conduct of this lady towards her husband, *in particular*, so far as the *settlement* was concerned, I have already adverted. *Mr. Wickham*, indeed, not unnaturally, ascribes her "constant opposition to his wishes in *all* respects," and her perpetual attempts "to vex and harass him as much as possible," to a preconcerted plan on her part, "either to make him glad to get rid of her upon her own terms," or to provoke him to some acts of violence of which she might be able to avail herself, so as to obtain her avowed end (a separate maintenance), in *that* way. In this view of the subject, to be sure, her *general* conduct, *as a wife*, abstract from this particular of the settlement, has, more or less, a reference to it all along. Be the cause, however, what it might, the evidence can suffer no doubt to be entertained as to the effect. *Wickham* says, that "*Mrs. Best's* conduct (her general conduct, that is) *to her husband*, during the whole period of their cohabitation, was, as far as it came under his, the de-

ponent's observation (and this deponent had every opportunity for observation) grossly improper. She frequently abused, and expressed violent resentment and anger against him. She did so upon all occasions—~~set him~~ completely at defiance, and acted in opposition to all his wishes, seemingly for the sole purpose of annoying him. The deponent hardly knows how to describe her conduct as a wife, otherwise than by saying, it was the very reverse of what it ought to have been. "The deponent has frequently," he says, "seen Mr. Best with his face scratched and disfigured—how frequently he does not remember, nor can he, *of his own knowledge*, depose to the manner in which his face became in that state." But this chasm in the evidence of Mr. Wickham, as to the actual perpetrator of these outrages, whom he declines to specify *as of his own knowledge*, is amply supplied by the testimony of other witnesses. Butterfield speaks to having repeatedly "seen Mrs. Best strike Mr. Best, pull his hair, and scratch his face," and to having once seen her throw him down stairs. He says, that Mr. Best's face was so much scratched and torn, after these assaults, that he, the deponent, was unable to shave him for several days together. Once, too, in this deponent's presence, she threw a decanter at Mr. Best, which missed him, but was broken to splinters (owing, I presume, to the force it was thrown with) against the wainscot. He further says, that Mr. Best often left the room when Mrs. Best was conducting herself in this violent and abusive manner, and retired to other parts of the house, generally to the servant's hall, in order to avoid her. He has known him to do so as often as

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two or three times a week ; remaining there several hours at a time. He, the deponent, always locked the door upon these occasions ; but Mrs. Best frequently followed—would sometimes knock gently, in order to get in, by making him, deponent, believe it one or other of the servants ; but at others, would knock violently, and insist upon being admitted. The evidence of Butterfield, in all these several particulars, is fully confirmed, not only by Holt, who constantly attended upon Mr. and Mrs. Best, as footman, through the whole period of their cohabitation, and therefore had every opportunity of observing their conduct towards each other, but, which is more material, and much more satisfactory, by English. Her answers to the interrogatories which have been addressed to her, on the part of Mr. Best, warrant a conclusion, that the evidence of Holt and Butterfield, upon these points, if a little too highly coloured, from that degree of bias which must be made allowance for in the evidence of servants of either sex, especially in suits of this description, is still, in substance, correct. In answer to the 16th interrogatory, she says, that “ Mr. Best used often to go and sit in the servant’s hall, to avoid Mrs. Best, but that she often followed him thither ; and, on his shutting the door, would force it open and assault him. She would pull his nose, or hair, and scratch him, frequently fetching blood—so that his face and person were *often* much disfigured.” In answer to a former interrogatory, the 14th, she had said, that she, the respondent, never *saw* Mrs. Best throw decanters or glasses at her husband ; but that she had often removed them from the table, under the apprehension that she, else, would have proceeded

to that extremity. It clearly appears, I should observe, by the evidence, that Mr. Best is verging toward seventy, and, partly, at least, crippled in one if not both hands—and that Mrs. Best is a “strong muscular woman,” in the prime of life, having, at the time of her marriage, been only three-and-twenty. Her witness, English, says, on the 10th interrogatory, that she has often seen her “take him by the arm, and swing him round like a child;” and Holt says, to the same effect, that his master, Mr. Best, was “no match for her.”

With conduct like this, on her part, it could hardly be that the wife should succeed in her suit—that her libel should be proved in that material part of it, which represents her sufferings at the hands of her husband as unmerited and unprovoked. It has been repeatedly laid down in these Courts, that no wife can solicit their interference with effect to protect her from (even from ill) treatment which she has drawn upon her by her own misconduct—she must *first*, at least, seek a remedy in the reform of her own manners. If, however, it should appear that even misconduct on the wife’s part has produced a return from the husband *wholly* unjustified by the provocation, and *quite* out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife’s positive, misconduct. And this being so, it must be obvious, from what has already fallen from the Court, that this inquiry limits itself, so far as the cruelty charged by the wife is concerned, to a consideration of whether any blame *of this sort* can be justly said to attach to the conduct of the husband, upon the evidence before the Court.

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The marriage of these parties took place in December, 1817, and the first acts of cruelty, specifically charged, are pleaded (namely, in the 5th article of the libel) to have been committed on the 14th and 15th days of March, 1818; I say "*specifically charged*," because it certainly is pleaded *generally*, in the introductory part of this 5th article, that the husband began to ill treat and beat his wife "*shortly after the marriage*." The 5th article of the libel however charges, *specifically*, that "the wife being seated *by a window*, in the drawing-room, on the first of these days, the husband, without any cause, struck her with a horsewhip across her left breast, which caused her to fall, senseless, to the ground, and occasioned a swelling, which lasted a considerable time;" and that on the following morning, about five o'clock, "he put a lighted candle under her bed, and swore he would burn her in it, alive." And it is further pleaded, in the 6th article, that in consequence of these acts of violence, she, the wife, applied to a magistrate, and swore the peace against him. These to be sure are serious charges, especially the last; an attempt to burn her alive is more than even Mrs. Best's demerits could justify. Let us see how they are sustained in evidence.

The two first witnesses designed to this article are Mary Brooks and Mary Boxall.

Brooks, who at the time of her examination in April, 1820, was only eighteen years of age, says, that in August, 1817, she being then out of place, and resident in Canterbury, was hired as a sort of general servant, to accompany Mrs. Best, then Miss Halladay, to Ramsgate, where she proposed to spend a short time. She continued however in her ser-

vice; and, upon her marriage to Mr. Best, accompanied her to his house at Chatham, where she remained for about six weeks, until discharged by Mr. Best. She further says, that on the 26th of February last [that is, 1820] she re-entered, and was then living in the service of Mrs. Best, resident at Bucklands, near Dover, separate from her husband. And to the third interrogatory she answers, that, shortly before so re-entering Mrs. Best's service, she received a message from her, to ask whether she had any objection to come forward, and state what she knew about Mr. Best's "taking his pistols to her, (a matter, by the way, not charged in the libel) and his other ill treatment of her?" To which she answered in the negative—

Mary Boxall (formerly Halladay) is the sister of Mrs. Best. She says, that she went on a visit to Mr. and Mrs. Best, at their house at Chatham, at the time of their marriage, and remained with them there for about six weeks from that time, which agrees with the period of the discharge of the first witness by Mr. Best—

And both witnesses admit not being even in the same house with the parties, on or about the 14th of March, 1818, the time when the facts charged in the 5th and 6th articles of the libel are laid to have occurred.

Now with respect to certain acts of violence, prior in date to the 14th of March, 1818, *not specifically complained of* by the wife, but *spoken to* by Brooks and Boxall *as* upon the 5th article of this libel, the Court is disposed to dismiss them from its consideration, pretty much, altogether; as being matter to which Mr. Best has had no opportunity, either

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of counterpleading, or even addressing interrogatories, for want of that specification. I must further too observe, that both these witnesses, Brooks and Boxall, from their answers to certain *general* interrogatories administered by the husband, adverted to by his counsel in argument, have rendered themselves, in point of credit, to say the least, very exceptionable.

This last objection indeed applies nearly, or quite as strongly, to the third, and only other witness upon this article, Ann Young. She, however, being properly enough designed to this article, as having lived in Mr. Best's service at the time when the acts of cruelty specifically charged in it are alleged to have been committed, it becomes necessary for the Court briefly to consider her evidence upon it.

Her evidence on the 5th article of the libel is to this effect:—She says, that about a week after she entered Mr. Best's service (where she continued for nearly six months, as his wife's waiting maid), she, having been rang for, went into the drawing-room, and, on entering it, found Mr. Best very angry with Mrs. Best about a little hurt she had got in her lip, which she said had been done the day before by her parrot, but which Mr. Best, it seems, was inclined to ascribe to the bite of a *different* species of animal. She says, that after swearing at and threatening her for some time about her lip, he fetched a riding whip from an adjoining room, and adding, "Damme, Madam, I *will* now horsewhip you," struck her a violent blow with it across her left breast. She screamed and fainted away, on which the witness and Mrs. Filmer, the house-keeper, went to her assistance, and carried her up stairs, where, after

bathing her temples and using other remedies, they succeeded in restoring her. She says, that the breast was, at first, a good deal swelled, but afterwards turned black; and that the bruise was visible upon it for several weeks afterwards. Upon the charge of putting a lighted candle under her bed, &c. on the following morning, all which this witness (the only witness upon it) says, is, that "one morning, about two or three mornings afterwards, she heard a noise in the bed-room, as if Mr. Best was in a passion with his wife—that presently after the bell rang, and she heard her mistress calling out for her to go to her—that on entering the room she found Mrs. Best just getting into bed again, and Mr. Best not there, but descending the stair case—there was a candle and candlestick lying on the floor, the candle apparently just put out—that Mrs. Best appeared much agitated, and requested the witness to come to bed to her, to protect her." She further says, that in the evening of that day, when Mr. Best struck her with a horsewhip, as above, she did go, accompanied by the witness, to a magistrate at Chatham, and complain to him of her husband's behaviour to her. The observations suggested to it, by this piece of evidence, the Court will reserve, until it has an opportunity of remarking upon the testimony of this witness, Young, upon the libel, taken as a whole. But to proceed with the other specific charges of cruelty.

The 6th article pleads, that, "in the beginning of May, 1818, Mr. Best, without any provocation, put himself in a violent passion, and beat his wife upon the head with his fist, in a very cruel manner—that she escaped from him into the bed-room, and fastened

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the door, when Mr. Best came up stairs with a large kitchen poker, and broke open the door,—and in the most violent manner threatened to kill her, but was prevented from doing so by the presence and interference of Mrs. Filmer, the house-keeper, who came from her room, it being about eleven o'clock at night, in consequence of Mrs. Best's screams."

Now upon this article, as well as on the last, Filmer, who is vouched as a witness, is not produced, and the sole witness again is this Ann Young. Her account is pretty much to the effect of the plea; there is one discrepancy however. The blows are pleaded to have fallen upon the head of the complainant: the witness says nothing of this, but speaks to her "arm being much bruised from the shoulder to the wrist." This is a discrepancy, however, perhaps not very material.

The next article pleads, *that* "one day in June, 1818, *after dinner*, Mr. Best knocked his wife off her chair, (the parties being then at *Southend*); and afterwards, on her attempting to get up stairs, followed her and beat her about the head and left cheek, and side, in a cruel manner, so as to cause her cheek to swell, and produce a constant pain in her side."

Now upon this article the Court, in part at least, has the testimony of an additional witness Mary English, upon an interrogatory that is addressed to her by the husband: for Young, again, is the sole witness designed by the wife to *this* article. Young's account is, *that* she was in the bed-room, over the drawing-room, where Mr. and Mrs. Best were sitting *at their wine after dinner*, when she heard a violent scream, and, running down stairs,

encountered her mistress coming out of the drawing-room, crying very much—her hair was about her shoulders, and the comb, which usually fastened it up, in her hand. She went up stairs into the bedroom, accompanied by the witness, but was immediately followed by Mr. Best, who exclaimed on seeing her, "Oh! you are here, Madam;" and, advancing to her, began beating her violently about the head, face, neck, and body, with his doubled fists. Mrs. Best resisted a little, and presently after struck him again; but he overpowered, and knocked her down, and then went away. The *housemaid*, who had ran up stairs on hearing the noise, after endeavouring in vain to part them, ran to assist Mrs. Best as soon as Mr. Best left her on the ground. The witness says, *that* Mrs. Best complained of being much hurt, and unable to go down stairs, and went to bed almost immediately—and that bruises were visible on her face, neck, and bosom.

Such is the substance of Young's evidence upon the 7th article. But that of English, upon an interrogatory addressed to her, as I have said, by the husband, places the whole transaction in a very different light. English is the person designated by the last witness as the "*housemaid*," who interfered upon the occasion in question. She at that time *was* housemaid, but afterwards became Mrs. Best's personal attendant. She says, that upon going up stairs (as spoken to by Young) she found Mr. and Mrs. Best fighting on the landing-place, each beating the other. Mrs. Best then *went off into a fit*, and the respondent assisted to recover her: to be sure, when recovered, Mrs. Best did "complain of Mr. Best's beating her." *She said* she had been sit-

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ting by the window, when a gentleman passing by, happened to look up at her; upon which Mr. Best, without any provocation, knocked her off her chair. The respondent further says, however, that Mrs. Best, at the time in question, was intoxicated; and *that*, when in that state, she often abused, struck, and fought with Mr. Best. It appears from the answers of this witness, that Mrs. Best had often fits when intoxicated, ("her fits," she calls them) without receiving any blow.

S/ The above is the substance of Young's evidence upon the 5th, 6th, and 7th articles—articles to which she, in effect, is the only regular, designed, witness: for the evidence of Brooks and Boxall upon the 5th article, for reasons already assigned, is pretty much out of the question; and English's testimony, *as* upon the 7th article, is merely drawn out upon an interrogatory. Now the answer, of this witness, Young, to the several interrogatories administered to her on the part of the husband, and, in brief, her general evidence, as contrasted with that of nearly every other (I may say of every other *credible*) witness in the cause, do, as already hinted, detract most materially from the credit due to her; in fact, they render it impossible for the Court to rely upon her evidence, unless confirmed by that of some other witness. But Young being, in effect, the sole witness upon the 5th and 6th articles, and the collateral testimony of English, *as* upon the 7th article, not only not corroborating that of Young, but *substantially* disproving it, there is a total failure of proof upon these articles—there is even something more; for I do think that Mr. Best's answers upon these articles, which have been read by the counsel



for Mrs. Best, and which certainly represent these matters very differently from the plea, more than counterpoise the single testimony of a witness of Young's description.

The single witness upon the 8th, 9th, 10th, and 11th articles of the libel is Mary English. English I admit with the counsel for both parties, to be a fully credible witness; but her evidence, in my judgment, is so far from convicting the husband of legal guilt, that it goes some way to exculpate him from moral blame. What is her evidence upon the 8th article, for instance:—She says, *that* between six and seven o'clock one evening, in the month of December, 1818, the bell having been rung for her, she went up stairs into the breakfast room, where Mr. and Mrs. Best were then taking their wine, after dinner—when she entered the room Mrs. Best was standing by the mantle piece, leaning against it, and Mr. Best was desiring her to leave the room. Mr. Best told the deponent to take her mistress out of the room, and again desired Mrs. Best to leave it; to which she replied that she would not; for that she had as much right to any part of the house as he had. Mr. Best then pushed her, as if to remove her from the mantle piece, and again told the deponent to take her away. Mrs. Best rather resisted the push, and told Mr. Best that “if he attempted to touch her again, she would wring his nose off;” upon which he immediately struck her a violent blow with his fist, which knocked her down, and struck her head against the chimney piece as she fell. She was senseless from the effect of the blow; and Mr. Best stooping, as if to lift her up, laid hold of her by the hair; but, on the deponent's remonstrances,

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shifted his hold, and assisted by the deponent, lifted her by the arm to a sofa, which was just by. The deponent, at the same time, asking Mr. Best how he could use his wife so? he replied, "Damn her, she has been praising her favorite man, Captain B.; saying, what a charming fellow he is, and that I am a snuffy old fool." Mrs. Best recovering, in a few minutes, on the application of some vinegar, Mr. Best again insisted on her leaving the room, but she said she would not, and, taking a chair, seated herself at the table. Such is her evidence *in chief*. In answer to an interrogatory which has been addressed to her, as with reference to this particular transaction, she says, "the blow was a hard blow, because it broke the comb in Mrs. Best's head; and that Mrs. Best did fall on the floor senseless, and remain so for some minutes—in one of *her fits*. She was intoxicated, however, at the time, and had been abusing Mr. Best in the *usual* manner." She further answers, that she cannot say whether the fit, upon this occasion, proceeded from the blow. She had often those fits when in liquor, from *that* cause, when she had received no blow.

Now upon this account of the witness, can it be said that what occurred (which is charged as a specific act of cruelty in the 8th article) was without great provocation? She had indulged herself in comparisons (proverbially odious upon all, and certainly not least so upon *such* subjects) between her husband and Captain B., her "favorite man" as he styles him. [English says, by the way, that she often reproached him in this manner, namely, by casting in his teeth the praises of her "favorite men," which always put Mr. Best in a passion. She would some-

times say, "Now I will make him as jealous as the devil," and then would begin praising gentlemen whom she said she had met, when out walking, although she (English), who had accompanied her, well knew that she had met no such persons. And this perfectly accords with what Holt and Butterfield have deposed of her conduct in this particular, although in terms too indelicate, as very much of this evidence is, for recital in open Court. But to return] The husband, upon the occasion in question, does not immediately proceed to resent this sort of language by any personal harshness, but desires her to leave the room; which she not only refuses to do, but accompanies her refusal with *menaced* violence if he attempts to compel her. *Actual* violence, as might be expected, does ensue; and, probably, it was intended that it should. And if the wife suffered by it, can it be said that she was not the authoress of the whole, by her grossly improper conduct? I am clearly of opinion that she was; and that the conduct of the husband in this instance, so provoked, unjustifiable as I admit it to be, does not come up to the notion of legal cruelty.

Observations of a similar import apply to this witness's depositions upon the 9th, 10th, and 11th articles; but it is unnecessary, and it would be disgusting, to state and observe upon them in detail. It may be proper, however, that the Court should briefly advert to her evidence upon the 12th article, being the article which contains that material averment of the party complainant having finally quitted, and ceased to live and cohabit with her husband, in August, 1819, from considering her life in peril, by reason of his cruel and violent conduct towards her.

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English deposes, that there had been disputes and differences between Mr. and Mrs. Best a few days before they separated, upon the *old* subject of the will. She sent several messages to him by the deponent, to say, that unless he satisfied her as to what he had left her in his will, she would not live with him; to which he replied to the effect, that he had left her enough, if she conducted herself well; but that if she did not, *that* would be taken away. In the course of these disputes she speaks to having been the bearer of a note from her mistress to Mr. Best, *about two days before they separated*, and to the exhibit, No. 6, annexed to Mr. Best's allegation, being that identical note. It is conceived in terms of such irritating and scurrilous reproach (terms far too gross for recital), that it *could* only be designed to provoke the husband to some act of violence. It is impossible, I think, to put any other interpretation upon it. The *above* circumstances, connected with the final separation of the parties, are described by the witness, English, in her answers to the 34th and 35th interrogatories. Upon her examination *in chief*, she says, to this article of the libel, "*that* for some time previously Mrs. Best had expressed herself determined not to live with Mr. Best, in consequence of *his behaviour to her*; but she did not hear her express any fear that her life would be in peril by remaining. Two or three days before she left the house, she told the deponent, that she "*meant to go and see her friends*;" that she was aware Mr. Best would object, and that, *then*, she intended "*to kick up a devil of a row, and set off the next morning*." Now how utterly inconsistent this evidence is with an averment that she, the party complainant,

quitted her husband's house at Chatham in August, 1819, under a sense of present peril to her person from continuing to reside with him, need scarcely be observed upon. No breach of the peace in fact appears to have occurred—the lady quitted her abode without actual disturbance: not that if it had, so studiously provoked on her part, it would at all have amended her case—a case which I have no hesitation in pronouncing to be disproved altogether, and not to entitle her to the relief which she seeks. I accordingly dismiss *her* complaint, and proceed to consider that of the husband.

It may first be fit, however, that the Court should express its sense of the utter impropriety of that frequent recourse which Mr. Best is proved to have had to personal violence, even although it admits, at the same time, that upon most, if not upon all, occasions of his so doing, he did not want for *great* provocation. It attaches, too, no small degree of blame to the use of that language, whether given or retorted, in which his reproofs were usually conveyed—reproofs abounding in epithets always ungrateful to female ears, and which possibly become more ungrateful, in nearly what proportion the epithets, themselves, are less inappropriate. Mr. Best should peculiarly have avoided the use of these epithets, pending cohabitation, even had he believed her guilty of *nuptial* infidelity. As to any *antenuptial* immorality, that had been purged, *quoad him*, by his consenting to take her for his wife. What, again, could be well more reprehensible than, if not his groundless suspicions, still his gross modes of giving vent to them—at one time, for instance, by insisting that the coachman was in bed with his wife—at an-

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other, by searching the closets in her bed-room, and under her bed, as suspecting them to conceal some gallant. Throughout that course, too, of excessive drinking, which led to most of their personal conflicts, it cannot be overlooked, that the husband does not appear to have interposed, as he was undoubtedly called upon to do, any sort of restraint; he, on the contrary, in their afternoon sittings, seems to have been usually a sharer in such computations. Of what Mrs. Best's counsel have said, however, namely, that the wife's indelicacies in language and conduct (too gross to be specified) were not foreign to the taste of her husband, I see no proof. On the contrary, the witness, English, says, that he *often* expressed high disapprobation of them; saying, somewhat coarsely indeed, "he would be damned if he could bear it"—that "she ought to be ashamed of herself, and was worse (in these respects) than a common prostitute." But to proceed,

Mr. Best accuses his wife of adultery with a person named Meers, a farmer, resident at Chilham, near Canterbury, and with whom she had been *acquainted* previous to her marriage. His allegation charges, *that*, on her journey to Dover, soon after the marriage, upon the occasion, to which I have already adverted, of consulting her solicitor, Mr. Kennett, she stopped at Canterbury; and *that* at the house of Isabella Elder, situate in Ruttendean Lane, in that city, being a house of notorious ill fame, she met this Meers by appointment, on or about the 5th of January, 1818; and then and there had a criminal connexion with him—little more than a fortnight, it will be seen, this, from the wedding day. Upon this charge two questions arise, 1. Is

the adultery proved? 2. What, being proved, under all the circumstances of the case, is its legal effect?

1. The witnesses examined in support of this charge are a man named Wash, Meers himself, and Charlotte Morgan. The two first of these, at least, are to be heard with caution; but it is of necessity that "*in re lupanari, testes lupanures admittentur*;" and I see nothing in the nature of the evidence which these persons have given, confirmed as it is by circumstances, and by the whole complexion of this case, which induces me to consider them as having deposed untruly.

Wash deposes to having been dispatched by Elder with a message to Meers from Mrs. Best, whom he had known for years before, at the time articulate, desiring him to meet her at Elder's that evening—to his delivery of this message to Meers, and to Meers's reply, which was, that he was coming to Canterbury, and would be at Elder's at the time appointed—and to his report of that answer to Mrs. Best in person, then at Elder's, who expressed her delight at the prospect of a *renewed* intercourse with Meers, in terms, as spoken to by this witness, so grossly indecent, that the Court is *compelled* to dispense to itself with the obligation of recording them.

Morgan, who was perfectly acquainted with the persons both of Meers and Mrs. Best, from Mrs. Best having lodged at her (the deponent's) mother's previous to her marriage, and from her having been visited there, occasionally, by Meers, deposes, positively, to having seen Meers and Mrs. Best go together into the house of Mrs. Elder, next door to that in which the deponent then lived with her mother, in Ruttendean Lane, Canterbury, a few weeks *after*

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her marriage—a fact which, *alone*, would suffice to found a sentence of separation, and not the less so in this than in any other case, from Mrs. Best's antenuptial habits and acquaintance with the mistress of such a house; which, I should observe, was, indisputably, a house of ill fame, and is spoken of as such by *all* the witnesses.

Lastly, Meers, the "*particeps criminis*," has deposed to having met Mrs. Best at the time and place articulate, and to the fact of adultery having been, then and there, committed between them.

Such is the parol evidence. Added to which, a verdict is exhibited, obtained by Mr. Best against the adulterer in an action, judgment in which, however, went by default. Such a verdict, in *no* case, would be evidence of adultery against the wife; it being *res inter alios acta*, a proceeding to which *she* was *no* party. However, as a *circumstance merely* of the case, it was entitled to be pleaded, and the Court is bound, as such, to notice it.

Added to this, again, are two letters from Mrs. Best to Meers, leaving no doubt of the existence of a criminal attachment between the parties. There is, I admit, something alarming in Meers having delivered up these letters to the agent of Mr. Best; but this does not detract from their authenticity, and the hand-writing of Mrs. Best to the letters is not only pleaded, but proved. They certainly afford evidence strongly confirmatory of the parol testimony given by the witnesses who have been examined in proof of the charge—a charge against which, it only remains to observe, that Mrs. Best has set up *no* defence—she has not counterpleaded to the fact alleged—she has suggested no previous connivance,



nor has she insisted upon any subsequent condonation. Under all these circumstances the Court, I think, is bound to hold that the adultery charged is sufficiently proved. Next for its legal effect.

2. Now the Court has been very properly urged, as with reference to that effect, to take into its consideration the conduct of the husband, who, it has been contended, does not stand before it as a party entitled to relief for several reasons. It is objected, for instance, that the husband could expect no other, or better, from the antenuptial habits and character of the party whom he had chosen to make his wife. But the Court can only notice *these* as requiring a stricter attention, on her part, to her conduct as a wife—they, at least, cannot be urged with effect to have authorized, in the first instance, or to protect her, if committed, from the consequences of, a wilful violation of her marriage vow. The culpability of the husband's conduct, in the several particulars instanced by the Court in disposing of the wife's complaint, has also been insisted upon, as lessening, and detracting from, his claim to relief upon his own. But the complaints are not *in pari delicto*—nor could the one, if established ever so clearly, as in the case of mutual adultery, be received by way of compensation for the other. Dismissing *these* objections, therefore, at least for the present, I proceed to consider whether a detected epistolary correspondence between Meers and the wife, followed by no inquiry, no vigilance, no restraint, does not constitute, as charged, such a case of constructive condonation of this single fact of adultery, after a "probable knowledge" of it on the part of the husband, as, under all the circumstances, and together with

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what else of unfavorable to the husband's case; results, as I shall presently observe, from his conduct in this particular, precludes it from justly founding a sentence of divorce—especially considering that the effect of such implied pardon, assuming it to be, is weakened or effaced by no subsequent misconduct, *in this kind*, even imputed to the wife, either with Meers or with any other; and that she, the wife, is the *prior petens*, the complainant in the suit—the husband only hunting back upon this scent to find matter for a defensive allegation to his wife's charge of cruelty—an allegation itself, by the way, not concluding with a prayer for a separation, *that* being only introduced at the final hearing of the cause.

The letters to which the Court alludes, are two letters dated respectively the 10th and 15th of February, 1818, found by Mr. Best in his wife's drawers (probably, very shortly after her receipt of them), plainly written to *her* by Meers, though addressed under cover to her sister Mary Halladay, *then*, it will be recollected, on a visit at Mr. Best's. They are no (direct) evidence, of course, against the wife, introduced in the mode in which they come before the Court, being merely annexed by Mr. Best to the interrogatories administered on his part to the witnesses upon his wife's libel. The Court is now adverting to them, not to criminate the wife, but as affording some test of the conduct of the husband.

It is not necessary that the Court should descend into the particulars of these letters, some parts of which, indeed, are not very intelligible. It will be sufficient to observe that they abound in expressions of ardent attachment, and must have satisfied Mr.

Best that his wife maintained a correspondence, by letter at least, with Meers, and through this Elder, whose character and office Mr. Best, if ignorant of (which can scarcely be presumed), might easily have made himself acquainted with. He insists upon the "lock of her hair, *which she, Mrs. Best, had promised him,*" in a broach; he hopes to have the pleasure of seeing her soon "*at the old place,* for he wants to see her very much," and so on.

Such is the general tenor and import of these letters—to the propriety of Mr. Best's conduct, *on becoming possessed of which*, no objection can reasonably be taken. It appears that he then, or soon after, produced them to his friend or agent, or both, Mr. Wickham, and to his solicitor Mr. Jeffries; and that he acted, in some sort, under their advice, in making light of the matter, does *in part* relieve him from that culpability attaching, in my judgment, to his subsequent conduct. On the 21st article of the allegation (the article which pleads that Mrs. Best's adulterous conduct did not come to her husband's knowledge till after she withdrew from his house in August, 1819, and that he has never since lived or cohabited with her) Wickham deposes, that, prior to this final separation of the parties [indeed *upon* the discovery of these letters, as results from a comparison of *this* gentleman's evidence with that of Jeffries upon the same article], Mr. Best had shewn him a letter purporting to have been addressed to Mrs. Best from Meers, couched in very familiar terms, and had desired him to make inquiries about it, which he did, but could trace nothing criminal to Mrs. Best. Sometime, however, *after* Mrs. Best had finally quitted her husband; the de-

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ponent received certain information respecting the parties, which he communicated to Mr. Best, who, thereupon, directed him to make *further* inquiries, which, in a word, led to a discovery of Meers and Mrs. Best having been criminally connected. The deponent saith, *that* from all that passed between him and Mr. Best, {upon the subject deposed of, he is satisfied that, though Mr. Best might have some loose suspicions of impropriety between Meers and his wife, he had no sufficient ground to conclude, still less any actual knowledge, that a criminal intercourse had subsisted between them, until after the deponent had communicated to him the result of the *further* inquiries just deposed of—"subsequent to which" he goes on to express his conviction that "Mr. Best has not cohabited with his wife." The evidence of Mr. Jeffries on this 21st article of the allegation, which it is not necessary to state, in detail, is precisely to the same effect, with the addition, that he (Mr. Best's professional adviser, it is to be observed) not only expressed his opinion to Mr. Best, that the letters amounted to nothing like proof of a criminal intercourse, but also, that, knowing him to be of a jealous disposition, he treated the matter "rather lightly." Now the evidence of these gentlemen, that of the last especially, I repeat, partly relieves Mr. Best from the charge of acquiescing too tamely under a discovery of letters of this description received from Meers by the wife; and it, perhaps, frees him altogether from the imputation of having cohabited with her, after being fixed with *actual* knowledge of her postnuptial incontinence. Still, at the same time, that he should, not *merely* have cohabited with her after a circumstance

so pregnant with suspicion as the discovery of these letters, but that he should have done so, uninterruptedly, and without a remonstrance, or even a hint to the wife herself on the subject, so far as appears, not only falls little, if at all, short of a constructive pardon of any *prior* connexion between Meers and the wife, after *probable* knowledge of it, but savours much more strongly, in my judgment, of that blind attachment to her person, which led him to make her his wife, "with all her frailties upon her head," pre-disposing him to acquiesce in *any* advice which might justify him, *to himself*, for continuing to cohabit with her, than of that proper feeling for his own honor, which the husband must have evinced to entitle him to a sentence of separation, by reason of his wife's adultery; of which I am given to understand, from the arguments of his counsel, that Mr. Best is now, at length, desirous.

But granting, for an instant, that Mr. Best can be justified or excused for dropping so summarily (if, indeed, he can fairly be said to have instituted) any inquiry into the nature of his wife's connexions with Meers, *upon* the discovery of these letters, did no cause occur for its renewal in those journies in which Mrs. Best was in the habit of indulging (under the pretext indeed of visiting her friends) to Dover, the direct road to which from Chatham lay through Canterbury, in which, and in its neighbourhood, Elder and Meers still resided? I am of opinion that cause, and sufficient cause, did repeatedly occur. Such inquiries Mr. Best would, and must have made, had he felt, as he ought to have felt, for his own honor; and if equal diligence to that which appears to have been exercised after his wife finally withdrew from

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his house for the purpose of instituting this suit, and by way of furnishing a defence to it, had been used at any time antecedent, I see no reason why it should not have been attended with the same result. Meers, if apprized that Mr. Wickham was in possession of *his* letters, would as readily have delivered up Mrs. Best's at one, as at another, time. What ground is there for presuming that his horror of incurring the imputation of "*falsehood*" was any greater after, than it was before, Mrs. Best withdrew from her husband's protection? (a) Subse-

(a) The witness Meers, as with reference to these letters, deposed, on the 20th article of the allegation, that he gave them up to Mr. Wickham, clerk to Mr. Best, on being served by him with a writ in an action for damages brought against him by Mr. Best for criminal conversation with Mrs. Best. The deponent gave them up voluntarily, as soon as he found that Mr. Wickham *knew all about the business.*" And on the 14th interrogatory, that "he had no other view in delivering up the letters, than that he imagined he might lie under the scandal of being a *false young man*, if he kept and denied having them, after it was well known that he had them. He had no idea, at the time, that they would be brought forward against Mrs. Best in this cause, nor did he give them up with that view. He thought that he had done wrong, and was willing to make what reparation he could by acknowledging his fault, and giving up the letters."

Wickham deposed, on this 20th article of the allegation, that "on serving Meers with the writ, &c. he explained to him in the course of conversation, some of the evidence which Mr. Best could bring against him. He, Meers, then stated to deponent that he had received letters from Mrs. Best, and endeavoured to exculpate himself, as having been led into what had passed by her invitation." He afterwards produced the two letters in question to the deponent, and assented to his taking them away. In answer to the 14th interrogatory, this witness in substance deposed, that neither he nor any other person, to his

quant to his wife's quitting him, Mr. Best has, undoubtedly, brought his action against Meers; and he has set up his wife's adultery, though at a somewhat late period, yet still before the conclusion of her suit for cruelty, in his defensive allegation. That adultery, in my judgment, is sufficiently proved; but something more than this, namely, an absence of *all* impropriety, *at least as connected with this charge*, on his part, is still requisite to found a sentence of separation. It is true that the adultery complained of is a *single* fact; and that her knowledge of Meers's letters having fallen into the hands of Mr. Best would, naturally, lead to a greater degree of caution in the wife's management of her future correspondence, if any, of this description, whether by letter or otherwise, either with Meers, or with any other gallant. This might render a detection of the wife's guilt difficult, or, to give the argument full weight, impossible, with such means of information as the husband *then* possessed, had he taken pains to detect it, and made inquiries to that end, *recenti facto*. But that he should have taken *no* pains—should have made *no* inquiries—upon occasion either of his discovery of Meers's letters, or of his wife's frequent (subsequent) journeys to Dover, until when, after a cohabitation of nearly two years, they had finally

knowledge, had given or promised, directly or indirectly, any compensation or reward to Meers, either for the surrender of these letters, or for suffering judgment in the suit at common law to go by default, or for his (Meers's) evidence on behalf of the produeent in this cause. It was sworn by Jeffries, that the damages assessed by a sheriff's jury at 50*l*. (the judgment going by default) had been paid by Meers, he, Mr. Jeffries, having, as Mr. Best's solicitor, actually received them.

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ceased to cohabit on the wife's preferring, against *him*, a substantive legal charge of cruelty; and that he should then, at last, *only* have had recourse to these, at least in the first instance, by way of getting at something in the nature of compensation, or set-off, to the wife's complaint, either amounts so far to a constructive condonation of the single fact of adultery charged (of which, if it *be*, the effect, I again say, is weakened or effaced by no suggested repetition of the offence so constructively pardoned), or it argues such misconduct, *as connected with this charge*, in the husband, whether owing to negligence, or to something equally culpable, namely, wilful blindness on his part, that in either view of it, in my judgment, it precludes the Court, in the exercise of its public duty, from founding upon this single fact of adultery a sentence of separation—at the *tardy* prayer of the husband, more especially, and under all the accompanying circumstances, not in themselves a little remarkable, of this case. I shall therefore dismiss *both* parties from all further observance of justice in the present suit—not without the consolation, that, if the impression which I have formed upon the evidence before me should be erroneous, my decree may be corrected, on revision, by the appellate jurisdiction.* *

*. * This sentence was confirmed, on appeal, by the Court of Arches, on the 4th Session of Trinity Term [1823], the Dean (Sir John Nicholl) not *merely* concurring with the Court below in *its* view of this case, in both parts of it, but further intimating, that he had some doubt whether, upon a nice consideration of the evidence, the adultery charged to have been committed by the wife was sufficiently *proved* to have entitled the husband

to his remedy of a divorce (in a case of this nature, and under the circumstances), supposing, that is, the husband *not* to have been barred (as he concurred with the Court below in thinking him) by his conduct, *viewed in reference to this particular charge*, from his title to a divorce, *upon that ground, specially*.

During the argument, the Court inquired whether the counsel were in possession of any case, where, cruelty being charged by the wife, and adultery by the husband, both charges were held to be proved; and, if so, what had been deemed the legal effect.

The counsel replied, that they were not aware of the existence of any such case; nor presumed to conjecture what the legal effect would be.

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PREROGATIVE COURT OF CANTERBURY.

SMITH and BLAKE v. CUNNINGHAM.

Questions of revocation, all, to some extent, questions of intention. Hence, testamentary instruments (regularly executed ones, in particular) are hardly to be deemed revoked by mere inference and implication, under any circumstances; but are certainly not to be, under circumstances tending to shew, that the testator's intention was, not to revoke them.

JOHN ROBLEY, formerly of Russell Square, in the parish of St. George, Bloomsbury, in the county of Middlesex, but late of the island of Tobago, in the West Indies, Esquire, was the party deceased in this cause.

The deceased quitted this country in the year 1808, immediately prior to which, he made and executed his last will and testament, in the presence of three witnesses, and thereof appointed his wife, Caroline Robley, his brother, George Robley, Messrs. Smith and Blake (parties in the cause), and Mr. Charles Brook, executors and trustees. The deceased executed this will in duplicate, one part of which he took with him to the West Indies.

Between this period, and that of his death, in November, 1821, the deceased made and executed several codicils to his said will.

The first codicil to the said will, is dated Tobago, 18th July, 1812. By this codicil, executed in the presence of three witnesses, the testator revokes two prior codicils, bearing date, the first at Tobago, the 13th of October, 1808, the second at St. Vincent, the 30th November, 1809 (a), and, after mak-

(a) These two codicils were not found—and are presumed to have been destroyed by the deceased.

ing several bequests as therein contained, confirms his said will.

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The second codicil, executed in the presence of four witnesses, is dated 30th August, 1818. It confirms the will and codicil of July, 1812—and revokes the appointment of Mr. Brook, whom it expressly excludes from acting as executor or trustee, under the said will and codicil.

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The third codicil, executed in the presence of three witnesses, is dated 15th June, 1817. The deceased, by such codicil, after making a variety of bequests, confirms his will, and two codicils, dated as above, and appoints James Cunningham, Esq. of the island of Tobago (party in the cause), executor and trustee of his said will and codicils, and guardian and trustee of his natural daughter, Phillisaida, and his other natural children, if any—in which trust he afterwards joins his cousin, Paul Kneller Smith, Esq. (a), by the same codicil.

The fourth codicil bears date the 18th of June, 1817. It is written and signed by the deceased, but not witnessed. It contains a single bequest, that of a legacy, to "Miss Eliza Robley."

By the fifth codicil, bearing date on the 9th of January, 1819, the deceased bequeathed certain legacies, and executed the same on the day of the date, but without any witnesses. This being pointed out to him, when about to execute the next following codicil, to wit, on the 26th of October, 1821, he, on that day, re-executed this fifth codicil, in the presence of the three witnesses who at the same time attested the execution of the sixth codicil.

(a) This gentleman, Mr. Kneller Smith, is not the Mr. Smith, an executor under the will, and party in the cause.

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The sixth codicil bears date on this 26th of October, 1821. The testator thereby confirms and republishes his will, *recited* as bearing date "in the month of December, 1807, *or* in the month of January, 1808," and "the several codicils thereto, respectively bearing date in or about the month of August, 1813, and in or about the month of January, 1818, [by error for 1819 (a)] by him made and executed"—omitting all mention of any other codicils. By this codicil, the deceased also nominates a Mr. Irvine, of Tobago, one of his executors and trustees. It makes several bequests, and is executed as above, in the presence of three witnesses.

The seventh and last codicil, is one of bequests *merely*. It bears date on the 29th of October, three days after the preceding; and this also is executed in the presence of three witnesses.

A caveat having been entered at the suit of Mr. Cunningham, executor under the fourth codicil, against probate passing, to the executors, of the will, and *confirmed* codicils, the same was warned, and an appearance was given for Messrs. Smith and Blake, *praying*, that probate of the will of the deceased, and *four* codicils, dated respectively 30th August, 1813—9th January, 1819—26th October, 1821—and 29th of October in the same year, might be granted to them, as two of the executors named in the said will; and declaring, that they opposed the codicils dated the 18th of July, 1812—the 15th of June, 1817—and the 18th of July, 1817. The three codicils, so opposed, were propounded, on the

(a) See note (a), page 452.

part of Mr. Cunningham, in an allegation, consisting of eight articles, of which the following was the substance :—

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1, 2, 3. The three first articles of the allegation pleaded merely the *facta* of the three codicils, of the 18th July, 1812, the 15th of July, 1817, and the 18th of July, 1817, in manner as already stated.

4. The fourth article pleaded, that the deceased, after making these, placed the same, together with another codicil bearing date the 30th August, 1813, in an envelope, or cover, upon which was written, "Codicil to the will of John Robley, Esq."—"To George Robley, Esq. Studley Park,"—under which there appeared a line drawn, and thereunder was written, "Thomas Bird, Esq. Sherwood Park—James Cunningham, Scarborough" (a)—*that* the said envelope was then enclosed, together with the will, in *another* envelope, endorsed, "George Robley, Esq. or James Cunningham, Esq. Scarborough," the words, "James Cunningham, Esq. Scarborough," being in the deceased's hand-writing—*that* the said (outer) envelope was then sealed, and deposited in a box in the deceased's writing-room, in the house in which he then resided, at Golden Grove, in Tobago.

5. The fifth article pleaded, that the deceased, after the making and execution of the first codicil pleaded and propounded, viz. that of July, 1812, occasionally opened the same, and made alterations, by substituting, in divers places, other names for

(a) A town of that name in the island of Tobago, not Scarborough in Yorkshire. This is to be understood where Scarborough is named in the case, throughout.

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those originally written—viz. “Frederick” and “Phillisaida,” the names of two natural children, for “Edward” and “William,” the names of two other natural children of him, the deceased, and the name and addition “William Brasnell, Esq.” for those of “Thomas Bird, of Sherwood Park”—that the said Thomas Bird died in July, 1813, and the said Edward and William Robley, respectively, in the months of July and November, 1814—that Phillisaida was not born until the 21st of August, 1815, and that Frederick died about the month of April, 1817.

6. The sixth article pleaded, that the codicil of 20th October, 1821, was prepared at the request of the deceased, by Christopher Irvine, Esq. one of the deceased’s executors named in such codicil—that the deceased, at that time, was not resident in the house in which the will and former codicils were deposited, but in a *new* house, situate in the same Golden Grove; so that, in giving instructions for preparing such codicil, he was unable to describe the exact dates of the will, or former codicils, that bearing date the 9th of January, 1819, being the only one in the house, and not produced to the said Christopher Irvine until the morning (a) following that upon which the instructions were given, when it was executed—and that the said Christopher Ir-

(a) When the following memorandum was added, at the foot of this codicil of 26th October, 1821. “Memorandum—That it being observed that the codicil herein mentioned to bear date in the month of January, 1818, was not duly witnessed to pass real estate, it was this day re-executed by the said John Robley, immediately before the execution hereof, and witnessed by the witnesses hereto—the true date of the said codicil being the

vine; as such executor, had duly proved the will of the deceased, and the *whole* of the said seven codicils, in the Court of the Ordinary of the island of Tobago.

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7. The seventh article pleaded, *that*, at the making and execution of the said codicil of the 26th of October, the said deceased neither desired nor directed Mr. Irvine to revoke any codicil by him before made, and that he neither meant nor intended, by such codicil, to revoke the codicils now propounded; nor adverted, specifically, to the said codicils, or any of them, upon such occasion—and that the deceased's will, together with the first four codicils, remained, in the envelope, in the box at the deceased's former residence—and the last three codicils, at his latter residence—and were so found after his decease.

8. The eighth article pleaded merely the deceased's continued regard for, and correspondence by letter with, Mr. Cunningham, up to the time of his decease.

Two additional articles to this allegation were afterwards admitted. The first pleaded the deceased's affection for his natural children, especially his daughter Phillisaida, expressed to his several friends—and that once, especially, about the month of May, 1817, in conversation with a friend, Colonel Campbell, he declared his intention to leave this daughter, Phillisaida, 10,000*l*. The second addi-

24th day of January, 1819. Signed, William Downe, John Pomeroy, Angus Ross,"—being the witnesses to the codicil of 26th October, 1821—in which codicil itself is the date January, 1818, by mistake, it thus appears, for January, 1819.

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tional article merely exhibited three letters (annexed) from the deceased to Mr. Cunningham, dated, respectively, 28th March, 1819, 9th August, 1821, and 21st of October, 1821, in supply of proof of the premises mentioned in the eighth article of the original allegation.

This cause was heard upon the *answers* of Messrs. Smith and Blake to the above allegation—admitting *generally* the facts as pleaded—and submitting to the law, and the judgment of the Court, what codicil or codicils, if any, the deceased did mean and intend to revoke, by the codicil bearing date the 26th of October, 1821.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased in this cause executed a will, and seven codicils. The will bears date on the 19th of January, 1808—the first codicil, on the 18th of July, 1812—the second, on the 30th of August, 1813—the third, on the 15th of June, 1817—the fourth, on the 18th of June, 1817—the fifth, on the 9th of January, 1819—the sixth, on the 26th of October, 1821—and the seventh, and last, three days after, on the 29th of October in the same year. The deceased died on the 3d of November following.

Of these several testamentary instruments, the will, and four codicils, the second, the fifth, the sixth, and the seventh, are not opposed. The first, the third, and the fourth, on the contrary, are opposed by Messrs. Smith and Blake, the executors in the will—and are propounded by Mr. Cunningham, an executor named in one, the fourth, codicil. These codicils are said to be revoked under the sixth co-



dicil, that of the 26th of October, 1821, whereby the deceased, " confirms and re-publishes his will, bearing date in the month of December, 1807, or in the month of January, 1808, and the several codicils thereto, respectively bearing date in or about the month of August, 1813, and in or about the month of January, 1818," omitting any mention of, or reference or allusion to, either of the other three. Now,

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The revocation contended for, in this instance, is clearly one by implication. If at all, it is under the sixth codicil; in which codicil, neither the codicils said to be revoked are specifically adverted to—nor has it, though supposed to revoke the codicils omitted, any general clause of revocation. That revocation, if at all, then, is to be made out by mere inference from the passage of the sixth codicil just recited—which, whether it has or has not, under the circumstances, the effect sought to be ascribed to it in law, is the sole question for adjudication.

All questions of revocation are questions, to some degree, of intention; for every fact of revocation is *said to be* equivocal. If so, the question, in this instance, is *peculiarly* one of intention; as the fact, itself, of revocation alleged must be admitted to be *peculiarly* equivocal. It remains, then, to consider the other facts of the case, I mean those indicative of the deceased's intention, in order to determine the legal import and effect of this fact of revocation, so, in itself, as I have just said, *peculiarly* equivocal. I will only premise, that two of the three codicils opposed, being regularly executed, and attested by three witnesses (the nature of the

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third, that of the 18th of June, 1817, hardly suggesting *that* formality, as conveying a mere pecuniary legacy of no large amount, yet still that, as well as the two others, being *all written* by the deceased himself), the intention to revoke these must be clear and unequivocal, in order to effect their *actual* revocation—all legal presumption being, obviously, in favor of instruments so prepared and executed.

And, first, is any thing to be collected as to the testator's intention with respect to these instruments, from the place and company in which they were left by the testator, and found after his decease? Something *is* to be collected from these, and that, decidedly, in favor of the instruments. They are found inclosed in the same envelope with the codicil of August, 1813, expressly ratified and confirmed by the codicil of October, 1821, and so admitted to be operative; and, again, this envelope is sealed up in another envelope (together with the *will*, ratified and confirmed as above), addressed by the deceased to his executors. If the rule "*noscitur à sociis*" at all applies, this circumstance is material; for even their opponents must admit that these codicils make their appearance in good society.

But the question of intention as to these codicils may, I think, be decided by *other*, and clearer, indications; some of which are the following:—

*Both* envelopes, of which I have just been speaking, are addressed to "James Cunningham, Esq.;" the one, in conjunction with Mr. Bird; the other, in conjunction with Mr. Robley. The words "James Cunningham, Esq.," in the outer envelope, that addressed to him, in conjunction with Mr. Robley, being in the deceased's hand-writing. But it is one

of the codicils alone (that of June, 1817), now said to be revoked, that appoints Mr. Cunningham an executor, and, together with the deceased's cousin, Mr. Kneller Smith, the guardian and trustee of the deceased's natural children. And these appointments of Mr. Cunningham are in the following emphatical words:—"And I hereby declare, that I appoint, as an executor and trustee of my said will and estate, James Cunningham, Esq., of this island, to whom only, and to him, in intire confidence, I confide my private papers in Tobago; and I expressly request him to be, and I hereby appoint him, guardian and trustee of my natural daughter Phillisaida, and any other natural child I may have."

Now that the deceased, had he *meant* to revoke these appointments, should leave his meaning to be collected from mere inference and intendment, is improbable enough, in itself, especially as contrasted with what appears on the face of the codicil of August, 1813, where, meaning to revoke the appointment of Mr. Brook as executor, he does it in formal and direct words:—"I hereby exclude Charles Brook, Esq., from being an executor and trustee under my will." And the improbability of any such revocation is rendered still greater, by the circumstances, which are both pleaded and proved, that his correspondence with Mr. Cunningham continued until, and was only interrupted by, the deceased's death; and that it was not only, or chiefly, of a mercantile or commercial nature, as suggested in the answers of Messrs. Smith and Blake, but, on the contrary, was a correspondence of the most intimate and confidential sort; as, I think, sufficiently appears from the letters annexed to the allegation. Nor does

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any inference to the contrary, as contended, at all result from Mr. Irvine's appointment as an executor and trustee, by the codicil of 1821, to my judgment. There is nothing tending to shew that he was *substituted* in the place of Mr. Cunningham—he is not appointed *sole* executor—the deceased expressly, and in terms, appoints him “one of his executors and trustees,” to act in conjunction with his “other executors and trustees”—from the number of *which* “other executors and trustees” I am satisfied that it was *not* his *intention* to exclude Mr. Cunningham. Consequently, I am of opinion that it was not his intention to revoke this codicil of June, 1817; and by necessary inference, not the two others, said to be revoked, together with this codicil of June, 1817.

But further—the deceased, on executing the codicil of 1821, which is said to revoke the three prior codicils omitted to be specified, re-executed the codicil of January, 1819. Now the object of that codicil is to convey a further provision to his natural children, through the medium of Messrs. Cunningham and Kneller Smith, as their guardians and trustees. Can it then be supposed that, in the same instant, and almost by the same act, the deceased revoked the codicil of June, 1817, the instrument on which *alone* rests the appointment of these gentlemen as such guardians and trustees? And I may further observe, that the codicil of October, 1821, expressly confirms the codicil of 1813; which, *itself again*, expressly confirms the codicil of 1812, now, by the operation of this same codicil of October, 1821, argued to be revoked.

Again, the codicil of 1812 (said to be revoked as above) is the only one by which the deceased's house-

keeper (as he terms her), M'Kenzie, the mother of these natural children, has any thing like an *adequate* provision. But the last and latest act of the deceased's life, so far from implying diminished regard or affection for M'Kenzie, which the revocation of this codicil would imply, infers the direct contrary; for only three days after executing the codicil said to revoke that of 1812, to wit, on the 29th of October, the deceased executes a further codicil, for the sole purpose of still further providing for M'Kenzie; in which, after stating his anxiety for her future welfare, and that she may live with the comforts she has thentofore enjoyed, &c. he expressly desires, *that* she shall be permitted to occupy his house at Golden Grove, until his executors and trustees can make arrangements for her in the town of Scarborough—*that*, during that time, she shall have the attendance of all the servants and domestics, who have thentofore been in the habit of waiting upon her—*that* his said executors and trustees shall build her a commodious house in the town of Scarborough aforesaid, &c. &c. How utterly inconsistent all this (which *supposes* M'Kenzie in the possession of an adequate provision) is with any intended revocation of the codicil of 1812, on the part of the deceased, is too obvious for a comment.

Upon these considerations, to which others might be added, I am quite satisfied that Mr. Cunningham remains an executor, and that all these codicils, so meant by the testator, ought to be taken as parts of his will; although the sixth codicil recites the will, and two only, of the five, prior codicils *as* for confirmation. Had he meant it to be otherwise, the testator would have signified this *plainly*, as in the

1823.
Easter
Term.

SMITH
v.
CUNNINGHAM,

1823.
Easter
Term.

SMITH
v.

CUNNINGHAM.

codicil of 1812; where, meaning to revoke two prior codicils, he does so by a distinct reference to each of them, and in words directly expressive of a revocatory intention (*a*). The whole difficulty of the case has arisen from, and is to be accounted for by, this sixth codicil having been drawn up at a late period of his life, in the absence, and without any accurate recollection on his part as to the number, or dates, of his former testamentary instruments; and from its not having been *written* by the deceased himself, but prepared through the agency of Mr. Irvine, wholly a stranger to his former testamentary acts. That Mr. Irvine, however, had no suspicion of the deceased meaning to revoke the unrecited codicils by this sixth codicil, is evident from the circumstance of his having applied for, and taken, probate of the will, and the whole seven codicils, in the Court of Ordinary, in the island of Tobago.

I have only to add, that if, upon a true construction, the legacies to the natural children in the several codicils *are*, as they are suggested to be, *accumulative*, it may possibly be, as argued, that the natural children will be provided for, more largely than the deceased can be reasonably supposed to have contemplated (*b*). This, though the Court may

(*a*) "I, John Robley, do hereby completely and for ever revoke the two codicils to my last will and testament, dated on or about the 19th of January, 1808, the said two codicils bearing respectively the dates of Tobago, 13th of October, 1808, and St. Vincent, 30th November, 1809."—Codicil of July, 1812.

(*b*) By the first codicil, that of 1812, as altered by the deceased subsequent to her birth in 1815, his daughter Phillisida was bequeathed 1000*l.* and 100*l.* per annum. The second codicil, that of 1817, bequeathed her, specifically, 1546*l.* (a principal sum then in the hands of Mr. Kneller Smith, the deceased's

lament, it has not power to control; nor can it suffer any consideration of the sort at all to influence its judgment, as to what codicils are, and what are not, entitled to probate. It is the province of another Court to put a right interpretation on the instruments pronounced for—a province into which this Court (which has only to determine what instruments ought to be pronounced for) has neither the inclination, nor the right, to obtrude itself. Being satisfied that the deceased meant all these codicils to operate, the Court has no choice but to decree probate of the whole to Mr. Cunningham, jointly, of course, with the other executors.

1823.
*Easter
Term.*

SMITH
v.
CUNNINGHAM.

contain) with interest, together with the several sums of 1000*l.* and 4000*l.* Lastly, the third codicil, that of 1819, bequeathed her 5000*l.* and 250*l.* per annum. Supposing therefore the legacies in the several codicils to be accumulative, and not substitutive [i. e. supposing the legacy in each succeeding codicil to be accumulative upon, and not in lieu of, that in the codicil preceding it], this daughter Phillisaida alone would be entitled to no less a sum than 12,546*l.* and 350*l.* per annum. And as the codicil of 28th October, 1821, bequeathed to the testator's other natural daughters, Sybil and Clara, "an estate similar in all respects" to that given by former codicils to Phillisaida, the provision for these three natural children alone would, upon this construction, amount to 37,638*l.* and 1050*l.* per annum; a provision, it was argued, quite out of reason, and ruinous to his estate, and which the deceased therefore could never be supposed to have contemplated.

1823.
Trinity
Term.
1st Session.

TRINITY TERM,
1st SESSION.

ARCHES COURT OF CANTERBURY.

FOSTER v. FOSTER and Others.

(By Letters of Request from the Chancellor of the
Diocese of Lincoln.

A will and codicil torn into pieces by a testator's eldest son after the death of the testator—the pieces saved however; by which, and by oral evidence, the Court, arriving at the substance of these instruments, in effect pronounced for them, and condemned the spoliator, though proceeded against *in pœnam* merely, in costs.

THIS was a cause of proving, in solemn form of law, the last will and testament, with a codicil, of Charles Foster, late of the city of Lincoln, deceased, promoted by Ann Foster, widow, the relict of the deceased, and a legatee in the same, against Charles Foster, eldest son, and several, the other, children of the deceased. These other children, seven in number, were before the Court, consenting that this will and codicil propounded should be pronounced for. No appearance had been given for the eldest son, Charles Foster, and the proceedings, as against *him*, had been *in pœnam* throughout. This suit was instituted in the Court of Arches, in the first instance, by virtue of letters of request from the Chancellor of the diocese of Lincoln.

JUDGMENT.

Sir JOHN NICHOLL.

The facts of this case are, briefly, the following:—

The deceased, early in June, 1822, had been for some time unwell, and was advised by his solicitor, and by his medical attendant, to settle his affairs;

and it appears, that he only deferred complying with this advice until certain estates, held by himself and his brother Thomas Foster (formerly in partnership with him as a builder) in joint tenancy, were severed, by deeds of partition, so as to oust the right of survivorship incident to estates so held, and leave each brother at liberty to dispose of his several share. Instructions for effecting this partition had been given to Mr. Bromhead, the brother's solicitor, who prepared the necessary deeds of partition; and these were finally executed by, and between, the two brothers, at Mr. Bromhead's office, in Lincoln, about ten o'clock, on the morning of Wednesday, the 22d of June, the day upon which the deceased actually died. The deceased returned home on horseback, and was visited there, about one o'clock on that day, by his medical attendant. That gentleman, finding the deceased considerably worse, and apprizing his wife of this, left, by her desire, a message at the office of his solicitor Mr. Swan, that a Mr. Cook, one of his clerks, should be sent to the deceased for the purpose of making his will as soon as he came in—Mr. Swan himself being absent from Lincoln, and Cook not, just at that time, in the way. Cook attended the deceased accordingly, though not till about five o'clock, and took instructions for his will, the purport of which he immediately reduced into writing in the deceased's presence. He then withdrew, at his desire, with his brother Thomas Foster into an adjoining room, in order to calculate more nicely the value of his property, and to consider the best and easiest mode of carrying his testamentary intentions, explained, as above, by the deceased himself, into full and final effect.

1823.
Trinity
Term.
Foster
v.
Foster.

1892.
Trinity
Term.
 ~~~~~  
 BOYAN  
 v.  
 FOSTER

Certain alterations were made in the instructions, as originally taken, in the course of this conference; which alterations, however, the brother, Thomas Foster, afterwards explained to the deceased, who approved of them; and desired that a will should be prepared, immediately, pursuant to the original instructions thus altered or modified. The deceased shortly after fainted away, and became, so rapidly, worse and worse, that Cook, who had instantly set about preparing a will, was repeatedly urged to dispatch, and was at last obliged to conclude, somewhat abruptly, in order that the deceased might execute it so as to pass real estate, of which his property principally consisted (a). The will, in this state, was taken to the deceased, and was duly executed by him in the presence of three witnesses. This main object of the parties being thus secured, Cook, the writer of the will, began drawing up a codicil, by way of explaining the will, and expressing the deceased's intentions more fully and distinctly; but before this could be accomplished, though he wrote with the utmost possible expedition, he was apprized that the deceased had expired. These instruments are the will and codicil, severally, (*virtually*) propounded in this cause. I should say that the son, Charles Foster, was fully aware of these transactions, and was actually present at the execution of the will.

On the seventh day, the 29th of June, following, this will and codicil were produced to, and read in the presence of, the several members of the family, assembled on the occasion of the deceased's funeral.

(a) The deceased's real property was estimated at about 9000*l.* in value; his personalty, at only about 3 or 4000*l.*

After supper, the eldest son, Charles Foster, desiring to see this will and codicil, they were handed to him, together with the "instructions," by the brother, Thomas Foster, who, soon after, retiring for the night, left his nephew, apparently, perusing these, merely desiring him, when he had done with them, to give them to his mother for safe custody; instead of which, however, it appears that he left the room, and presently the house, abruptly, taking them with him. Of the subsequent history of these several instruments all which is known to a certainty, is, that the fragments of them were found, on the following morning, scattered in several close or fields adjoining the river Witham, near the deceased's house; but there is no question that this son Charles Foster had attempted to destroy these several instruments, altogether, by so tearing them to pieces, and scattering the fragments, where, as I have just said, they were found, by one of the brother Thomas Foster's children, on the next succeeding day.

It further appears, that the fragments of this will and codicil (all carefully collected) were, on or about the 7th of July following, pasted on two several sheets of paper, now before the Court, marked A. and B.; and that Mr. Cook, shortly after, copied out these fragments, filling up, at the same time, from memory and recollection, those parts, the fragments of which could not be found. Such copies are also before the Court, being the papers marked C. and D. (a), in which the words, not to be found among the fragments, and so supplied by Mr. Cook,

1888  
Trinity  
Term.  
Horton  
v.  
Horton.

(a) Paper C. was as follows:—The words and letters printed in italics being those supplied by Cook, the writer of the will,

1823.  
Trinity  
Term.

FOSTER  
v.  
FOSTER.

from memory, are underscored, to distinguish them from the others. And I am satisfied from the whole

from memory, underscored, to distinguish them from the others, in the *original* paper.

*This is the last will and testament of me Charles Foster, of the city of Lincoln, builder, which I make in manner following, that is to say, I give and devise unto my son, Charles Foster, all that messuage or inn, commonly called the Royal Oak, with the close, or paddock, and other hereditaments thereto belonging, situate in the city of Lincoln, aforesaid, and now in the occupation of my said son Charles Foster, to hold the same, unto and to the use of my said son Charles Foster, his heirs and assigns, for ever, subject nevertheless and charged, and chargeable, with the payment of the sum of one thousand four hundred pounds to be paid to my executors hereinafter named, within twelve calendar months next after my decease. I give and devise all that my messuage or dwelling-house, with the garden and paddock thereto adjoining and belonging, and situate in the parish of St. Botolph, and now in my occupation, unto my dear wife Sarah \* Foster, and her assigns, for, and during the term of her natural life, if she shall so long continue my widow; and from and after her decease, or marrying again, which should first happen, I give and devise the same unto, and to the use of my son David Foster, his heirs and assigns for ever. I give and devise unto John Coupland, of the said city of Lincoln, merchant, and John † Dixon, of the same*

\* This should be "Ann." Vide note (b), page 468.

† This should be "Richard." Vide Ibid.

evidence in the case, particularly that of Cook and the brother, that paper C contains the whole substance of the deceased's will; and that paper D expresses the true tenor and effect of the codicil, so drawn up by Cook, pursuant to the deceased's directions, in his life-time—the writer breaking off, immediately, on being apprized of his death. The original *instructions*, I should add, being written very close, in a small hand, and on both sides of a sheet of paper, the fragments of *these* could not be put together, like those of the will, and codicil. They are before the Court, indeed; but still as fragments only.

Such are the facts of this case, the application of the law to which is attended with little difficulty. The evidence, I think, establishes the *factum* of the alleged will—and also, that the codicil, so far as it goes, is conformable to instructions given by the deceased, and was reduced into writing during his life. Consequently, not only this will, if in ex-

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*place, maltster, all and every my messuages, lands, tenements and hereditaments situate, lying, and being at Haddington, and Thorp on the Hill, in the county of Lincoln, to hold the same, with the appurtenances, unto, and to the use of, the said John Coupland, and John Dixon, their heirs and assigns, for ever; nevertheless upon the trusts hereinafter mentioned, that is to say, upon trust, &c. &c.*

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Paper D was similar, in general appearance, to paper C—the words supplied from memory bearing nearly the same proportion to the others in *this*, as in paper C. It was not thought necessary, however, that either *this*, or the *whole* of paper C should be printed.

1823.  
Trinity  
Term.  
FOSTER  
v.  
FOSTER.

istence, would be entitled to probate, but, under the circumstances, the codicil also, though unexecuted, upon principles too familiar to all of us to suggest to the Court any need of repeating them (a). And the Court being satisfied—first, that these instruments have ceased to exist (to exist, that is, in their integral state) only under the circumstances just described—but that, secondly, the true tenor and effect at least, of these, though not *all* the very words, are still before it in papers C and D—under these circumstances, it is no less its duty to pronounce for papers C and D, than it would have been to have pronounced for the original instruments themselves, if total and entire. Accordingly, I decree administration to the widow with papers C and D annexed (b).

(a) See Wood and Wood, 1 Phillimore, 357. *Sikes v. Snaith*, 2 Phillimore, 355, *et al. pass.*

(b) The sentence was as follows:—

The Judge, &c. “pronounced for the force and validity of the true and original last will and testament, with a codicil thereto, of Charles Foster, the deceased in this cause, the said will being without date, and the said codicil without date or subscription, as contained in two paper-writings, marked respectively with the letters C and D, now remaining in the registry of this Court, annexed to, and pleaded and referred to in, a certain allegation given in, and admitted in this cause, on the part and behalf of Ann Foster, the lawful relict of the said deceased, and a legatee named in the said will, and bearing date on the 4th Session of Hilary Term, to wit, Monday, the 10th day of February, 1823—and directed the Christian names of the said Ann Foster and Richard Dixon, in the said will and codicil called Sarah Foster, and John Dixon, to be altered—to wit, the said name Sarah to be altered to Ann, and the said name John to be altered to Richard.”

It appeared, as should be stated, in order to explain this last part of the sentence, from Cook's evidence, that in supplying from memory, the defective parts of the will, and codicil, in

Costs were prayed against the son, Charles Foster.  
COURT.

1822.  
Trinity  
Term.

FOSTER  
v.  
FOSTER.

I feel some difficulty about condemning this party in costs. Of the gross impropriety of his conduct, there can be but one opinion: it can scarcely be reprobated in language severe enough. But he has given no appearance—the proceedings, as against him, are had, *in pœnam* merely; and I observe ~~on~~ mention, either of *costs*, *eo nomine* at least, or of the act of spoliation of which this son Charles Foster now stands convicted, in the “decree” which has been served upon him “to see proceedings.” I am aware of no instance of a party having been condemned in costs under such circumstances. The case cited by the counsel, that of Blackmore and Thorpe against Brider (a), was a criminal suit.—Question reserved.

no /

*On a subsequent day—Per Curiam—*

I think that the Court is justified in giving against this party the costs, as prayed. The “decree” *intimated*, that, in case of his not appearing, &c. the Court would proceed through the several intermediate steps, to the giving of a final sentence in the cause, “according to law and justice:” and it does appertain sufficiently to both of these, in my judgment, to condemn in the costs of this suit, the person whose gross misconduct has *principally* occasioned it. I say “principally,” because these parties must have come before the Court to establish the codicil, had there been no act of spoliation.

papers C and D, he had written *John* instead of *Richard* Dixon, and *Sarah* instead of *Ann* Foster (the deceased’s widow), merely inadvertently, or by mistake.

(a) 2 Phillimore, page 359.

1823.  
Trinity  
Term.  
Bye-day.

THOMAS and HUGHES v. MORRIS.

*(An Appeal from the Consistory Court of  
St. David's.)*

**THIS** was an appeal from the Consistory Court of St. David's, where originally it was an application for a faculty to confirm the erection of a vestry-room and gallery, in the parish church of Laugharne, in the county of Carmarthen.

*Quere, whether the ordinary is absolutely barred, in the exercise of his discretion, from granting a faculty confirmation of certain alterations made in a parish church, by reason of some omission (granting it to be) of legal form in the publication of notice of the vestry at which such alterations were resolved upon by the parish; and the churchwardens were empowered to make them.*

A process was taken out at the suit of Thomas and Hughes, churchwardens of the parish, reciting, "that at a vestry held on the 27th of April, 1820, and, by adjournment, on the 29th of the same month, it was resolved, that the churchwardens should construct, and they were empowered to construct, a vestry-room and gallery in the said church, according to a plan then produced; and that, in pursuance of this order, the vestry-room, and gallery over it, were constructed and completed; and that they prayed a faculty, approving and confirming the work." Accordingly, "the vicar, churchwardens, and parishioners, are cited, to shew cause why the faculty should not be granted," with the usual intimation, "that if they do not appear, or, appearing, do not shew sufficient cause against it, the faculty will be granted."

An appearance was given for some of the parishioners, but Morris was the only party who continued the opposition. The grounds of opposition were stated in "an act upon petition," and replied to; and affidavits in support of the different state-



ments were filed on each side. The matter came on for hearing, in the Consistory Court, on the 28th of November, 1822, when the surrogate presiding in that Court, refused to grant the faculty, and dismissed the suit, but without costs on either side. From this decree the churchwardens appealed to the Court of Arches; and the appeal now came on for hearing.

1823.  
Trinity  
Term.  
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THOMAS  
v.  
MORRIS.

In opening the cause on the part of the respondent, it was stated, that the objections to the grant of the faculty principally relied on, were; first, that the vestry was not legally held, there being no proof that the notice of holding it, after being published in the church, was affixed to the church-door, as required by the late act of Parliament (a); and secondly, that the additions were not necessary for the accommodation of the parishioners,

On the part of the appellants, it was stated, in the opening, *that* there was direct proof that notice of the vestry, and its particular object, was duly published in the church—*that* the vestry was held in the usual manner, and continued by adjournment—*that* the general concurrence of the parish was evident—*that* the work was done, and no

(a) 58 Geo. 3. c. 69. "An act for the regulation of parish vestries," which provides, s. 1, that "no vestry, or meeting of the inhabitants in vestry, of or for any parish, shall be holden, until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days, at the least, before the day to be appointed for holding such vestry; by the publication of such notice in the parish church, or chapel, on some Sunday, during, or immediately after, divine service; and by affixing the same, fairly written or printed, on the principal door of such church or chapel."

1822.  
Trinity  
Term.  
Thomas  
v.  
Morgan.

objection taken till long after it was finished, when disputes arose upon other subjects—that even if there were some omission of legal form (but which was not proved, nor could be presumed), in respect to the notice, however it might expose the church-wardens to risk, in regard to the expence, if the alterations should not be approved by the ordinary, still the objection was not fatal in this case; and did not bind the ordinary, in the exercise of his discretion, in the grant of a faculty confirming the work when done, if in itself the erection was proper to be confirmed. It was further stated, that the affidavits, taken in their just result, fully established, the want of increased accommodation in the church—the general concurrence and approbation of the parishioners—the making of a subsequent rate, to defray the expence—and that the opposition manifestly grew out of disputes which afterwards arose respecting the allotment of the seats in the new gallery; which allotment had nothing to do with the present question, and would not, in any degree, be affected by the grant of this faculty.

The Judge—

Sir JOHN NICHOLL,

Then observed, that having read all the papers, and affidavits, he was strongly disposed to concur in the view of the case as stated in the opening by the appellants' counsel; and he asked the counsel for the respondent, whether they could hope, in the argument, to maintain with success, either that the faculty could not *legally* be granted; or that, under the circumstances resulting from the affidavits, it would not be a proper exercise of the discretion of

the ordinary to confirm the erection of these useful accommodations in the church of so populous and opulent a parish? and whether their party would not be content to submit to a reversal of the decree appealed from, and to a grant of the faculty, provided the court, in the hope of promoting conciliation, and restoring harmony in the parish, should be disposed, in that case, to give no costs?

This proposition being acceded to, on both sides, the decree was so made by the Court.

1892.  
Trinity  
Term.

THOMAS  
v.  
MORRIS.

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BRIDGWATER, formerly HAYWARD v.  
CRUTCHLEY.

1893.  
Trinity  
Term.  
Bye-Day.

(By Letters of Request from the Chancellor of the  
Diocese of Llandaff.)

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JUDGMENT.

Sir JOHN NICHOLL.

This is a suit of nullity of marriage under the statute 26 Geo. 2. c. 33. (one of the last, probably, which this Court may be called upon to entertain) brought by the mother and guardian of a female minor, Charlotte Ann Hayward, against Josiah Crutchley, the *de facto* husband. The suit is had *in pœnam* against Crutchley, who has been personally served however (not indeed with the citation which issued in the first instance in this cause, for a *personal* service of *that* could not be effected but) with a citation (to the same effect) by ways and means, and also with a decree to see proceedings;

A marriage by  
licence deemed  
null and  
void under  
26 G. 2. c. 33,  
by reason of  
minority and  
want of legal  
consent—a  
nullity held,  
under the cir-  
cumstances,  
not to be cured  
by 3 G. 4.  
c. 75. s. 2.

1828.  
Trinity  
Term.



Bridgwater  
v.  
Carter.

and who, appearing to neither of these processes, has been formally, and regularly, put, and pronounced, in contempt.

The libel states the facts necessary to be proved, and the depositions of fourteen witnesses; who have been examined on the libel, prove those facts in a manner highly satisfactory. The proofs, indeed, (which the Court always expects to be precise in *ex parte* matrimonial suits) are peculiarly so in the case now before it. That case, as pleaded, and as it appears, thus fully, in evidence, is, briefly, as follows.

Charlotte Ann Hayward, the minor, whose marriage is sought to be dissolved, is the daughter of Joseph Arno and his wife (now Bridgwater, and party in the cause), and was born at Lyme, in Dorsetshire, on the 23d of March, 1804. In 1810 the father of the minor died intestate. The mother, soon after the father's death, removed to Brecon with her family, a son and four daughters, where they have ever since resided; and, in 1811, took the surname of Hayward, from respect to her maternal grandfather, so named; by which name of Hayward, and not that of Arno, her children, from that time, have passed, and are still known, as she herself *had* passed, and *was* known, till her marriage with Mr. Bridgwater, which is pleaded and proved to have taken place *subsequent* to the *de facto* marriage of her daughter, the subject of the present suit. This removal of the family from Lyme to Brecon, and their adoption of the name of Hayward, are only material on the score of identity; or, in other words, for the purpose of connecting *the* Charlotte Ann Arno, born at Lyme in 1804, with

the Charlotte Ann Hayward married to Crutchley, at Merthyr in 1822, and thus establishing the minority of the person so married, at the time of that marriage. The mother's *subsequent* marriage with Mr. Bridgwater was material on two accounts; first, on the score of identity again, that is, to identify her as the mother of the minor; and, secondly, in order to shew that her own marriage *was* subsequent to her daughter's—the marriage at issue in the suit. For on the mother's widowhood, at *that* time, plainly depended her right of consent to her daughter's marriage; and, consequently, her title to institute the present proceeding. In the mother, being a widow, the sole right of consent to the marriage of her minor daughter clearly vested: for the father, I have said, died intestate; and it is pleaded, and has been proved in the usual manner, namely, by a search into the records of that Court, that no guardian of the person of the minor had been appointed by any order of the Court of Chancery.

1823.  
Trinity  
Term.  
BRIDGWATER  
v.  
CRUTCHLEY.

The circumstances of the marriage, and what immediately preceded and ensued upon it, are these:

The party, Josiah Crutchley, being the son of a man who had, formerly, kept the Angel Inn at Abergavenny, but who then lived on a farm near that town, and whose mother and sisters, at that time, kept and managed a public-house, the Bell, at Brecon, procured a licence, *as* for this marriage, at Llandaff, by an affidavit, false in, at least, two particulars. For, first, he swore this minor to be of age; and, secondly, he swore her to be of the parish of Merthyr, where the marriage was meant to be, and afterwards actually was, celebrated. Mrs. Hayward and her family retired as usual for the

1833  
Trinity  
Term.

BRIDGEMAN  
v.  
CRUTCHLEY

night, on the day preceding the marriage, namely, on the 22d of March. Between two and three o'clock in the morning of the 23d, the minor, Charlotte Ann Hayward, left her bed in which she slept with a younger sister—called up a maid servant, Webb, a girl younger than herself, whom she had previously engaged as her *confidante*; and, accompanied by Webb, made her escape through the dining-room window, dropping a note with which Crutchley had furnished her, to mislead the family, by holding out that she was going to be married to Crutchley, at Carmarthen. Webb and Miss Hayward went directly to the Bell at Bracon, kept by Crutchley's mother and sisters, where they were joined by Crutchley himself; and these, with a fourth person, Crutchley's sister, immediately set-off for Merthyr, in a chaise from Abergavenny, previously hired and kept in readiness by Crutchley. At Merthyr, the party arrived about seven in the morning; and there, after breakfast, the marriage ceremony was performed by Mr. Jones, the curate, whose services in that behalf Crutchley had bespoke whilst breakfast was preparing at the inn. Crutchley's sister was left at Merthyr; the others, with Webb, proceeded in the same chaise *through* Abergavenny to Hereford, where they arrived about five in the evening, and put up at "the hotel" kept by a Mr. Bennett. There they dined, in a room below stairs, and Morgan, the chaise driver, was soon after, namely, about seven o'clock, paid and discharged, with an injunction from Crutchley, to conceal the place where Miss Hayward and himself had alighted, should this be inquired after. In compliance with which, this Morgan, having, on going out of Hereford, actually

encountered Mr. Bridgwater, who afterwards married the mother, and Mr. Augustus Hayward, the brother of the minor, in pursuit of her, told them, that he, Morgan, had left her, with Crutchley, at the Green Dragon. The alarm given by the one sister, on discovering the absence of the other—the distress of the mother at the news of the daughter's elopement—the pursuit of Mr. Bridgwater and Mr. Augustus Hayward, first in the Carmarthen direction; next, finding *that* a wrong scent, across the country to Merthyr, where they received intelligence of Crutchley's actual marriage to Miss Hayward; and, lastly, to Hereford, at the entry of which city they encountered Morgan, as I have said, are circumstances all spoken to very fully by the witnesses in the cause, and account for the arrival, at that precise time, of the persons in pursuit of these parties, at Hereford. In the mean time Crutchley, suspecting a pursuit, from hearing that a chaise and four, with two gentlemen, had just arrived, took the alarm, and decamped, with his bride, from Bennett's hotel to another inn, called "the Commercial Hotel," kept by a person named Woakes, leaving Webb at the house where they had first alighted. But the pursuers having, at last, discovered the retreat of the fugitives, through a porter sent to convey their luggage from Bennett's hotel, arrived at the Commercial hotel so close after them, that the coffee, which, according to the landlord Woakes's evidence, they had ordered *upon* their arrival, had not yet at that time been served up. The minor then, after some persuasion, consented to go back to her mother's at Brecon, where she arrived at about four or five o'clock on the next morning, that

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of the 24th of March; and she has since resided there with her mother, without any suggested intercourse or communication with Crutchley.

Now the daughter's minority—the mother's sole right of consent to her marriage—her prior ignorance of, and, when known, her total dissent from, her daughter's marriage, that of the minor in question in the suit—and, lastly, that such marriage was had under and by virtue of licence, are facts in this cause which are all proved beyond any possibility of doubt or question. And it need scarcely be said, that, upon this state of facts, *cohabitation or not*, the marriage is, under the statute of Geo. 2, clearly a nullity.

But as with reference to a *later* statute, to which the Court's attention must now be directed, *cohabitation or not*, in other words, *the circumstances ensuing upon this marriage*, are highly material to the question of its validity; so that the legal effect of these still remains to be considered. I will only premise, that the circumstances themselves, as narrated above, are fully proved by the several persons mentioned by name, in the course of the narrative—by the sister and brother of the minor; by Webb, the maid servant; by Mary, sister of the party Josiah, Crutchley; by Morgan, the chaise driver; and by Bennett and Woakes, the masters of the respective inns at Hereford. And I must add to this, that the effect of their evidence, which reaches, *uninterruptedly*, from the minor's elopement *from*, to her rescue at Hereford, and subsequent return *to*, her mother's at Brecon, is such as to satisfy my mind, not only that these parties have never *cohabited*, but that their *de facto* marriage has never been *consummated*.



The later statute to which the Court has alluded, is that of 3 Geo. 4. c. 75; the second section of which has provided, *that* "in all cases of marriages had, and solemnized, by licence, before the passing of this act, without any such consent as is required by so much of 26 Geo. 2. c. 33, as is recited in, and repealed by, the first section (a), and where the parties shall have continued to live together as husband and wife, till the death of one of them, or till the passing of this act, or shall only have discontinued their cohabitation for the purpose, or during the pending, of any proceedings touching the validity of such marriage—such marriage, if not otherwise invalid, shall be deemed to be good and valid, to all intents and purposes whatsoever."

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Now, with respect to the effect of the above clause upon the validity of this marriage, it is obvious that the *single* question must be—did these parties *only* discontinue their cohabitation for the purpose of some proceeding touching the validity of this marriage? For the parties are *both* still living; and the act in question did not receive the royal assent till the 22d of July, 1822, the cohabitation of the parties having finally ceased (if indeed they can be said, with any propriety, ever to have "*cohabited*" at all) on the 22d of March preceding, the very day of the marriage.

I am satisfied that the case before the Court is neither within the words, nor within the intention, of this clause of the act—under the provisions of which, as being an act *ex post facto*, it clearly ought not

(a) Namely, all that part of 26 Geo. 2. c. 33, which required (any) consent to the marriage of a minor by licence, under pain of such marriage, being null and void for want of it.

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to be included, by construction, or implication. Not within the words, for a reason already hinted; namely, that a cohabitation can scarcely, with propriety, be spoken of as *discontinued*, which had never commenced: there can be no end, properly, of what has no beginning. Not within the intention; for the intention of this clause was, obviously, in my judgment, if not to include a *particular* case, yet still, only to confirm marriages, which the parties themselves had previously confirmed (so far as in them lay), by a subsequent cohabitation, subsisting at the passing of the act, or *only* suspended for the institution of *some* proceeding, in order to ascertain thereby, this being doubtful, the legal validity of such marriage. Consequently, I am of opinion, that this marriage, null and void under the former act, is not rendered valid by the retrospective provisions of this recent statute, of which it comes, I have just said, neither within the *spirit* nor the *letter*; but that it still remains a nullity, which I pronounce it. And I am further of opinion, that the licence under which this marriage was had, having been procured by the wilful false swearing of Crutchley, the *de facto* husband, he ought, though proceeded against *in pœnam* merely, to be condemned in costs—a measure for which the Court, it seems, has a direct precedent (a); and I accordingly condemn him in the costs of this suit.

(a) Viz. in the case of *Porter v. Buckingham*; a cause of nullity of marriage (not said, however, upon what grounds, or in what Court), in 1772—cited by counsel.

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## PREROGATIVE COURT OF CANTERBURY.

LAWRENCE, Attorney of THOMAS, v. MAUD and  
PICKWELL.

(On Petition.)

**T**HIS was an application to the Court to rescind the conclusion of a cause, *after* sentence, but with a question still outstanding as to costs (*a*), under the circumstances, and for the purpose stated in the judgment, made in behalf of Mary Maud and Sarah Pickwell, and opposed on that of Frances Mary Thomas, respectively, parties in the cause. It was made, in the first instance, on a *motion*, which, being opposed, the Court declined acceding to. It was then renewed, as were also Mrs. Thomas's objections, in the present "act on petition," which was sustained, in the usual manner, on both sides, by exhibits and affidavits.

## JUDGMENT.

Sir JOHN NICHOLL.

This was, originally, a cause of interest (*b*) between Frances Mary Thomas, alleged to be cousin german, once removed, and Mary Maud and Sarah Pickwell, alleged to be the second cousins of Elizabeth Harrison, the party deceased in the cause. The interests of the parties were propounded, re-

*Quære*, whether the Court has power to rescind the conclusion of a cause, *after* sentence, against the sense and consent of the party for whom it was given.

Parties praying to be heard, upon their petition, as to any question, in the exercise of any other than a sound discretion, do so, at the imminent risk of costs.

(*a*) In pronouncing for the interest of Mrs. Thomas, the Judge had refused to give costs; whereupon her proctor, on behalf of his party, had prayed to be heard on his petition, as to this question of costs, on the bye-day.

(*b*) See page 331, ante.

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spectively, in two several allegations; but it was *agreed* (a) that evidence should be taken upon that of Mrs. Thomas alone, she being *alleged* of kin to the deceased in the superior or nearer degree. The parties entered into this agreement in consequence of the recommendation of the Court (b), founded upon a suggestion, *that* Maud and Pickwell, in the event of Mrs. Thomas *proving* her allegation, had *no interest*, upon their own shewing; and that, *failing to prove it*, she, Mrs. Thomas, had no concern with the case set up by Maud and Pickwell; which, whether proved or not, must, *to her*, be matter purely indifferent.

Accordingly, evidence was taken upon Mrs. Thomas's allegation *only*, or rather, upon such articles of it (being these subsequent to the 11th article inclusive (c)) as went to the *single* fact really at issue

(a) This could only be by agreement—the rule being, in causes of interest, that the parties shall propound their interests and proceed throughout in proof of them, *pari passu*, even where the alleged next of kin, as in this case, are in different degrees of relationship. This rule also obtains in the case of an executor setting up a will, and a party claiming to be next of kin, whose interest is denied. But where an administration has been fairly and regularly taken the rule varies; for the administrator, in such case, is *not* bound even to propound his interest, till that of the party questioning it has first been both propounded and proved. See *Dabbs v. Chisman*, &c. 1 Phill. 155.

(b) See pages 334—336, *ante*.

(c) The proctor for Maud and Pickwell had *admitted* in an act or minute of Court Mrs. Thomas's allegation, *as laid*, to the 11th article inclusive, in return for permission given him, in the same act or minute, by the adverse proctor, to question or deny the *rest* of the allegation, *without propounding* (for the actual admission of Maud and Pickwell's allegation stood over) and *going on to prove* his clients interest to question or deny it, in the first instance—that is, in other words, *without proceeding pari passu* in the cause.

between the parties, namely, the marriage of Peter Harrison, uncle of the deceased, and grandfather of Mrs. Thomas, with Elizabeth (Pelham) her grandmother, and the consequent *lawful* descent of Mrs. Thomas from this Peter Harrison, whom Maud and Pickwell alleged to have died a *bachelor*. And upon publication of this evidence, and its perusal by both parties, the fact of such *lawful* descent of Mrs. Thomas from Peter Harrison appeared to be so fully substantiated, that administration of the deceased's effects was decreed to Mr. Lawrence, as *her* attorney, without opposition on the part of Maud and Pickwell, their proctor declaring that "he proceeded no further" in the cause. This decree passed on the 4th Session of Hilary Term in the present year; and the question of costs stood for the Bye-day. In the mean time, however, the proctor for Maud and Pickwell received from America certain documents to the effect which I shall presently state, upon which the present application founds itself; in disposing of which, the first point for consideration is the precise nature and object of the application itself.

Now this application made at first, namely, on the Bye-day after Hilary Term, on a motion, and since renewed in the present act on petition, is one; it must be admitted, of a novel kind. It is not to rescind the conclusion of a cause *before* sentence, but, in effect, to revoke a sentence itself—a sentence, too, given with the concurrence of the other parties, testified by their proctor's declaring that he "proceeded no further in the cause." It may be doubted how far the Court is empowered to revoke a sentence so given, *against* the declared sense and

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consent of the party in whose favor it is given. At the same time, it clearly appearing, prior to the actual conclusion of any suit, that a sentence in it, even purporting to be a final one pronounced by the Court, had proceeded in error, or been procured by fraud—the Court would, undoubtedly, go the utmost *warrantable* length in either of such cases to find itself the means of revising that sentence, in furtherance of, what would *then* be, the demands of real and substantial justice. In the present instance, however, the party in possession of the sentence has not questioned the *right* of the Court to proceed as prayed. She has joined issue, fairly, upon the *merits*; and what she denies is, not the *power* of the Court to accede to the prayer of the petitioners, Maud and Pickwell, but merely the propriety of its exercise under the circumstances stated, on their part, in the petition. Let us see, therefore, upon what grounds this application rests.

This application then, being of the nature which I have described, rests solely upon two documents, received, among others relative to the Harrison family, from America, by the proctor for Mrs. Maud and Mrs. Pickwell, between the 4th Session and the Bye-Day of Hilary Term last. These documents are styled, in the act on petition, “an official copy of a grant of administration of the effects of Peter Harrison aforesaid to MARY Harrison, as widow of the said Peter Harrison, on the 18th day of May, 1775;” and “an official copy of an inventory of the said deceased’s estate, made and given in by the said MARY Harrison, as such administratrix, on the first Monday in July of the same year.” And they appear in the shape of extracts from the record book of the Court of Probate of Newhaven, in the state

of Connecticut in America (*a*), where this Peter Harrison died, in the year 1775, having been for many year's prior collector of the customs at that port. Hence it is inferred that *Elizabeth* (Pelham), who is pleaded by Mrs. Thomas to have survived her (alleged) husband Peter Harrison, neither was nor could be his lawful wife; upon the (supposed)

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(*a*) These documents were as follows:—

No. 1.

At a Court of Probate, held at Newhaven, in Newhaven district, May 18th, 1775.

Administration on the estate of Peter Harrison, Esq., late of Newhaven, deceased, granted to Mary Harrison, widow of said deceased, on bond of 1000*l.* money, with surety.

A true copy of record.

Attest. JOHN HUNTZ, Clk.

No. 2.

At a Court of Probate, held at Newhaven, in Newhaven district, on the first Monday of July, *Anno Domini* 1775.

Mary Harrison, administratrix on the estate of Peter Harrison, Esq., late of Newhaven, deceased, exhibited an inventory of said deceased's estate, which is accepted and approved for record.

[Here, in the original, follows the inventory.]

The above and foregoing is a true copy of record.

Attest. JOHN HUNTZ, Clk.

And I further certify, that the copy of the appointment of administration, and the foregoing inventory [the documents No. 1. and No. 2. printed above], is all that I can, after diligent search, find on the records of this Court appertaining to the estate of said deceased.

Attest. JOHN HUNTZ, Clk.\*

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\* Clerk, that is, of the Court of Probate and Administration, in and for the district of Newhaven, in the state of Connecticut, in the United States of America, and keeper of the records thereof, said Court being a Court of Record; so certified [27th December, 1822] under the hand and seal of office of the Judge of that Court; as also under those of his Britannic Majesty's Consul for the state and city of New York.

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proof of which fact the Court pronounced for the interest of Mrs. Thomas. And the Court is prayed to revoke that sentence, in order to afford Maud and Pickwell an opportunity of controverting the fact of Mrs. Thomas's *lawful* descent from Peter Harrison, by aid of that new light which the receipt of these documents has furnished them. Accordingly, it is further prayed, that Maud and Pickwell may have leave to alter their original plea, which alleged Peter Harrison to have died a bachelor, and to plead *that* "he had married one Mary (leaving a blank for her maiden name) who survived him."

When this application was first made to the Court, upon motion, and before the documents themselves, upon which it is founded, were brought in, the Court suggested that the christian name of "*Mary*" might, probably, be a mere clerical error for that of "*Elizabeth*." But taking these documents (now brought in) in conjunction with the evidence upon Mrs. Thomas's allegation, and with the affidavits exhibited in support of the averments on her behalf made in the present act, I entertain no doubt whatever of the fact being as I originally supposed it. It is a clerical error, and one that, I think, might occur without any great difficulty. The first document is a mere minute or memorandum in the register book that the administration passed, or was granted on such a day—it is not, what the act states it, "an official copy of the grant of administration" itself; and in such mere minute, or memorandum, the entering clerk might easily, in the hurry of business, have written "*Mary*" for "*Elizabeth*." Nor as to the other document again, is *this* an official copy of an inventory, given in by the administratrix as



"*Mary Harrison*," and so subscribed. The inventory itself has no signature or subscription. It is true that the heading of the inventory states it to be of the exhibiting of "*Mary Harrison, administratrix of Peter Harrison, &c.*;" but this heading was obviously written by the clerk, as appears from the words "*which is approved, &c.*" at the foot, who in writing it would naturally, the error not being detected, make it correspond, in this respect, with the former minute.

Now these being the sole foundation for the present application, and these at most only inferring that the lawful widow and relict of Peter Harrison was "*Mary*" and not "*Elizabeth*," how does the other case stand, (not merely) inferring (but proving, I think, in a manner most satisfactory) that the lawful widow and relict of this same Peter Harrison really was Elizabeth (formerly Pelham) and not Mary?

1. And, first, how does this matter stand in the evidence taken upon Mrs. Thomas's allegation in the original cause. The marriage, *de facto*, of Peter Harrison with Elizabeth Pelham, in June, 1746, is fully proved in such evidence. It is fully proved that they lived and cohabited as husband and wife, with mutual acknowledgment and general reputation, from that time to the death of Peter Harrison in 1775—he, too, being in a public situation, that of collector of customs at Newhaven. It is proved that they had four children, a son and three daughters, baptized, acknowledged, and reputed as legitimate—that on the death of the son, here, in England, in 1772, letters were written by relatives here condoling with the parents, as upon the loss of a

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legitimate child ; and, lastly, that two of the daughters (the third, Isabella, having died young), namely, Hermione, afterwards Mrs. Cargy, and Elizabeth, afterwards Mrs. Ludlow, and mother of Mrs. Thomas, actually inherited property from the parents, *as legitimate* children. How is all this at all consistent with the *mother* of these children not being the wife, or at least not the lawful wife, of Peter Harrison, but a Mary (something) ? for even to this instant the parties Maud and Pickwell do not pretend to furnish her original surname: nor can they, to this instant, pretend to any knowledge of Peter Harrison's marriage with a female of such christian or baptismal name, other than that derived by mere inference from these documents.

2. But, secondly, it is quite clear in my judgment, upon the affidavits now brought in in support of Mrs. Thomas's act, that administration of Peter Harrison's effects was granted to *Elizabeth*, and not to *Mary Harrison*, as his widow and relict ; and, consequently, that the occurrence of " Mary " instead of " Elizabeth," in these documents is, and must be, a mere clerical error. For instance, Mr. Curgenvin, who was well acquainted with the family of Peter Harrison, whom he succeeded as collector of customs at Newhaven, deposes to having himself seen the *original* letters of administration under the seal of the Probate Court at Newhaven, of the effects of Peter Harrison, granted to Elizabeth (not Mary), as his widow and relict. He further deposes to Elizabeth (grandmother of Mrs. Thomas) *acting* as such administratrix throughout. This deponent himself was actually examined as a witness on the trial, at a court of common law held at Newhaven, of a

suit (the particulars of which he also deposes to) brought against this Elizabeth, as widow and administratrix of Peter Harrison's effects, and in that character solely. Even the inventory itself said to be exhibited by a *Mary* Harrison, as administratrix, furnishes, in conjunction with the affidavits, a pregnant proof that the real administratrix was this Elizabeth. The inventory specifies a negro man named Apollo; a negro woman named Lucy; and two paintings, one of the "crucifix," (meaning, I suppose, the crucifixion) and the other of "St. Francis." Now it distinctly appears from the affidavits of Mrs. Thomas herself, of Mr. Curgenvén, and of a Miss Brenton, that Mrs. Thomas's grandmother, Elizabeth, actually had in *her* service and possession this very negro and negress, and these very pictures so specified in this inventory: how otherwise acquired than as the administratrix of Peter Harrison, and consequently the person who exhibited the inventory, it would be difficult plausibly to conjecture even.

I, therefore, reject this petition, and I think that I am bound to reject it with costs. In renewing their application to the Court by petition, upon such insufficient grounds, Maud and Pickwell seem to me *not* to have exercised a sound discretion; the effect of which, in strictness, undoubtedly is to render them liable to Mrs. Thomas in the costs of this proceeding. It may be commendable, perhaps even prudent, in Mrs. Thomas, under all the circumstances, to waive her costs; but I hold that the Court is bound, in strictness, to give her the means of recovering these from Maud and Pickwell, if so disposed.

Petition rejected.

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DICKENSON v. WHITE.

(On the Admission of an Allegation.)

A. dies, leaving, by will, his wife B. sole executrix and universal legatee. Allegation propounding a codicil to A.'s will, found subsequent to B.'s death, on behalf of a legatee, (B.'s executor refusing to take administration of A.'s unadministered effects with his will, and this codicil annexed) admitted to proof.

JOHN WHITEHEAD, the party deceased in this cause, died on the 28th of February, 1819. In the month of July, in that year, probate of his will, bearing date on the 3d of November, 1817, was taken by his widow, and relict, Hester Mary Whitehead, as sole executrix. In virtue of that probate, the widow, who was also, under this will, *universal legatee*, collected and administered the deceased's personal estate and effects, valued, after payment of his debts and funeral expences, at about 1600*l*.

On the 9th of February, 1823, Hester Mary Whitehead, widow of the deceased, died, leaving several testamentary papers, probate of which was duly taken by James White, party in the cause, *her* sole executor. Subsequent, however, to the death of Hester Mary Whitehead, a codicil (so said) to the will of John Whitehead, deceased, was first discovered. But White refusing, when called upon so to do, as executor of the wife, to accept letters of administration, with the will *and codicil* annexed, of the effects left unadministered by the wife of her late husband, the party deceased in *this* cause, whom she the wife had survived and represented as above—the latter, this codicil, was propounded in an allegation which *now* stood for admission, on behalf of Mary Dickenson, one of the universal legatees for life named in the said codicil, the other party in the cause—the party, namely, promoting it against

White, as sole executor of Hester Mary Whitehead, the widow and relict of the deceased.

This allegation propounding the codicil, after pleading the factum of the will in November, 1817, and that of the codicil (alleged) bearing date on the 31st of July, 1818, (this last expressly pleaded to be all in the deceased's hand-writing) as also, that probate of such will *only* was taken by his widow, Hester Mary Whitehead, on the death of the deceased in 1819; went on to plead, *that*

“ Hester Mary Whitehead, the widow and relict of the said John Whitehead, the testator in this cause, departed this life on or about the 9th day of February, in the present year 1823—*that*, immediately after her decease, Alexander Hale Strong, of Lincoln's Inn, in the county of Middlesex, solicitor, attended at the house of the said Hester Mary Whitehead, for the purpose of searching for her will; and having there met John White, party in this cause, and others of the family and friends of the said deceased, several testamentary papers which had been found were then read over by the said Alexander Hale Strong, in the presence of the said John White, and the said other persons—*that* the will and other testamentary papers of the said Hester Mary Whitehead, deceased, having been deposited in different places, a further and final search was afterwards made by the said Alexander Hale Strong, in the presence of the said John White and others of the family and friends of the said deceased, in order to discover whether any further or other will, or testamentary paper, had been overlooked; and a trunk, or portmanteau, having been found in a closet in one of the garrets of the said deceased's house, con-

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taining old bills and receipts, and a variety of other papers, which had not been before examined, the said trunk, or portmanteau, was brought down into a bed-room, for the purpose of being so examined; and at the bottom of the papers therein contained was discovered a small roll of paper, sealed; and having the following indorsement, in the hand-writing of the said John Whitehead, the deceased in this cause:—‘This paper to be opened by F. Le Man, Esq., in case of death’—*that* the said paper, on being so discovered, and appearing to be of a testamentary nature, was delivered to the said John White, party in this cause, and was by him taken to F. Le Man, Esq.; and thereupon the seal of the said paper was broken, and the same was read over by the said F. Le Man, and found to be the very codicil now pleaded and propounded in this cause.”

The codicil so propounded was in these words:—

There is 1700*l.* in the Bank of England, consisting of 2000*l.* consolidated 3 per cents. annuities, in my name, belonging to my wife Mrs. Whitehead; this sum, with the value of 3000*l.*, a policy of insurance on my life (a), in case of my own, or both of us dying, is designed as a provision for the niece Mary Dickenson, and the nephew James Dickenson, to be appropriated for their use solely, and to be secured so as to be protected from any claim that may arise from any other applicants in point of con-

(a) It is to be observed, that there was no such sum as that expressed, or any other, in the bank, belonging to the testator at the time of his death. The policy of insurance, however, was in existence, and the sum of 3000*l.* was actually received upon it by Mrs. Whitehead.

sanguinity; and the principal money to be secured in the Court of Chancery during their minority, and afterwards appropriated for their use only, with the personal property belonging to myself, so that the capital may be undisturbed during their lives, and afterwards to be divided equally between my wife's brother's and sister's children (a). Witness my hand, this 31st July, 1818.

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J. WHITEHEAD,

JUDGMENT.

Sir JOHN NICHOLL.

I have no hesitation in admitting this allegation to proof. The paper which it propounds is perfect in form, as well as testamentary in effect; and having been written (so pleaded) *by* the testator subsequent to his will, it must, on this and the other facts stated in the allegation connected with it appearing in evidence, beyond all question, be entitled to probate as a *codicil* to his will. I presume that its being overlooked upon the testator's death, and the widow, consequently, taking probate of the will *alone*, was purely accidental.

At the same time, as this whole case must depend upon hand-writing, and *finding* (not inconsiderably on the latter) it would be material to connect the alleged codicil *with* the testator, by pleading (that *is*, the *fact* being such) that the trunk *is*, and other papers *among*, which it was found, had formerly belonged to the testator. It would also be proper, at any rate, to introduce into the plea, *who* the Mr.

(a) James and Mary Dickenson were children of a sister of Mrs. Whitehead; the codicil only styles them *the* nephew and niece, without saying *whose* nephew or niece.

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Le Man is, to whom the opening and execution of this paper purports to be confided, and how connected with the deceased.

With these corrections, one or both, I admit the allegation (a).

Allegation admitted.

(a) These corrections being effected in Court, viz. by inserting, after the words "bills, receipts, and a variety of other papers," the following, "which had belonged to the said John Whitehead, deceased"—and after the name and addition "F. Le Man, Esq." the following, "who was a confidential friend of the said John Whitehead, deceased, in his life-time," the allegation stood admitted to proof.

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WEBB v. NEEDHAM.

(On Petition.)

Widow usually preferred to a next of kin in the grant of administration, notwithstanding her having married again.

Administration, upon what principle only, granted to a creditor—can only be, failing any other representative. A next of kin being also a creditor, a reason against his being preferred in a contest for the administration, either with the widow, or, probably, any other next of kin.

THOMAS NEEDHAM, the party deceased, died in the month of December, 1809, intestate, without child or parents, leaving a widow, **Louisa Needham**, and one brother **Ralph Needham**, his only next of kin.

In the month of March, 1823, this **Louisa** (formerly **Needham**, but *then* **Webb**, wife of **William Webb**) applied for administration of the goods of the deceased, as his lawful relict, and was duly sworn, and had entered into the usual bond, when a caveat against the grant was found to have been

being preferred in a contest for the administration, either with the widow, or, probably, any other next of kin.

entered on behalf of Ralph Needham, the brother, who subsequently appeared and prayed that administration of the deceased's effects might be granted to him, as next of kin.

The substance of the allegations on either side, as contained in an "act on petition," supported, in the usual manner, by affidavits, is stated in the judgment.

JUDGMENT.

Sir JOHN NICHOLL.

Thomas Needham, the deceased, died in the month of December, 1809, intestate. Administration of his effects is now applied for, both by the intestate's wife, and by his brother, and the Court has to determine between their several claims.

Administration of the goods of an intestate may be granted either to his wife, or to a next of kin. At the same time, it is well known that in practice, at least in modern practice, the wife is preferred in this matter, under ordinary circumstances. In the present instance, however, it is attempted to be shewn, that there are special reasons for reversing this order, and giving the brother a priority. The special reasons alleged are two:—The first of these is, that the wife has married again, and is now under coverture. The second is, that the brother is not only next of kin (indeed the sole next of kin), but that he is also a creditor of the deceased's estate to a large amount; in fact, to *nearly the whole* amount of the effects to be administered.

I. The single objection made to the widow is her having married again. Now this, under the circumstances, is, I think, no valid objection. The party who raises it, the brother, is entitled only to a

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moiety of the effects; it is not as if the deceased had left children, one of which children, supported by the rest, applied for administration in preference to the mother. *There*, the children being entitled to two-thirds, and the mother to one-third only, of the distributive property, this circumstance of the mother having married again *might* induce the Court to grant the administration to a child in preference. That, however, is not *this* case; and it will be time enough to determine what is fit to be done, *in that case*, when it occurs. But as in contest with the brother, I think that the wife's having married again is no valid ground of objection to her; and I find it to have been so held in a case determined in Dr. Andrews's time, of which I have a manuscript note, where, as in the present, it was urged against the wife, by the brother, of an intestate. I will only add, that if a re-marriage is no defeazance of the wife's title to a priority in this matter, generally, there is nothing whatever, in special, to make it such in the present case. The second husband is stated and sworn to be a man of some property independent of his business, that of a perfumer; thus affording the brother a sort of extra security for the custody and due distribution of the distributive property. The wife, too, has been actually sworn administratrix, and has given bond with sureties, who are also stated, upon oath, to be in respectable circumstances; which sureties themselves, thus able probably, are willing, at the same time, to *justify*.

2. Dismissing this part of the case, it remains to see whether the brother has made out his claim to a preference on the other matter alleged—that of his *also* being a creditor of the deceased.

It appears that the estate and effects of the de-

ceased consist of 450*l*. 3 per cent. consolidated bank annuities, devised to him by the will of his father, Ralph Needham deceased, payable on the death of his mother,

Needham, which happened only in the month of July, 1821; which stock, together with the dividends accruing since the death of the mother, is valued at about 340*l*. Now the brother alleges, that for divers monies lent to the deceased prior to his departure from this country for New York, in 1807; for other sums sent to, and advanced for him, whilst at New York; and for funeral expences, the deceased's estate is truly and justly indebted to him, the brother, in the sum of 300*l*. and upwards; that is, in nearly the whole sum at which the effects are valued. To this it is replied, on the part of the wife, that the estate of the deceased is indebted to the brother in no *such*, or in any other, sum; that the pretended advances in question to the deceased were really made by the mother, through the brother's medium or intervention only; and that the brother's claim is now advanced for the first time, the deceased having died in 1809.

Now here, in the first place, this circumstance of the *brother being also* a creditor of the deceased's estate, on which he relies for sustaining his claim to a priority, is positively denied by the wife. The parties then here are distinctly at issue; and this, being a question purely extrinsic and collateral, is one into the merits of which, most assuredly, the Court will decline to enter. But the brother's having disputable, or at least disputed, claims upon the intestate's property, is a circumstance rather adverse to, than in favor of, his pretensions to the administration, in my view of the case. Administration is only granted to a creditor, failing any other repre-

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representative; in which case there being nobody to sue, the creditor not being, *himself*, administrator, and so able to pay himself, must, almost of necessity, lay out of his debt. But where a person whose duty and interest it is to contest claims on the deceased's estate is before the Court, willing to undertake the administration, he or she it is that is entitled to the grant, and not the creditor, both in law and reason. As creditor *merely*, indeed, it is obvious that Mr. Ralph Needham could only obtain letters of administration on the widow (and next of kin) refusing, or declining, to take them. This union of the two characters in his single person, is rather, I repeat, adverse than favorable to his claim to be preferred, in my apprehension of its effect.

On these grounds, I am of opinion that neither of the reasons alleged are good in defeazance of the widow or relict's prior title to be administratrix. As for the matter of *laches* objected to her in the argument—the parties in this respect are *in pari delicto*; nor is the one, that I see, at all in a condition to employ it with effect as an argument against the other. The deceased's estate, save as to the monies now coming into distribution, is admitted, on all hands, to have been insolvent. Administration was applied for as soon as, or within a reasonable time after, the death of the mother furnished any thing to administer; and that, at least for any *practical* purpose, was time enough.

Upon the whole, I decree administration to the wife; and I think that, in order to deter parties in future from attempting to gain undue advantages, or those denied them in law, by vexatious experiments of this nature, I am bound at the same time to condemn the brother in costs.

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MILLER v. BLOOMFIELD and SLADE.

*(An Appeal from the Court of the Peculiar and Ex-
empt Jurisdiction of Great Canford and Poole(a).)*

THE Judges who sat under this commission were,

Mr. Baron GARROW,
Mr. Justice BEST (b),
Dr. ARNOLD,
Dr. JENNER,
Dr. DAUBENY,
Dr. GOSTLING,
Dr. DODSON, and
Dr. LEE.

THIS was an appeal from an order or decree, made, on the 8th day of October, 1822, by the Wor-

A libel, plead-
ing a church
rate, including
"stock in
trade," admit-
ted to proof.

(a) The parish of St. James, in Poole, is within, and forms part of, the *Royal Peculiar* of Great Canford and Poole. The official, who is the ordinary of this peculiar, is appointed by the lords of the manor of Great Canford, of which manor Poole is a part. [See Hutchins's Dorset. vol. i. p. 12—14.] From the official of a *Royal Peculiar* the appeal lies, not to the bishop of the diocese, or to the metropolitan, but immediately, and in the first instance, to the King in Chancery; that is, in other words, to the Court of Delegates.

(b) Mr. Justice Richardson was, also, named in the commission, but was too indisposed to be present at the hearing of this appeal.

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shipful and Reverend Charles Bowle, Clerk, Master of Arts, Principal Official of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, in a certain cause or business of subtraction of church rate, then depending before him in judgment, between Joseph Barter Bloomfield and Robert Slade, the younger, churchwardens of the parish of St. James, in the town, and county of the town, of Poole, the parties promoting the said cause or business, on the one part; and Richard Miller, a parishioner and inhabitant of the said parish, the party against whom the said cause or business was promoted, on the other part; whereby the said Judge admitted to proof a certain libel, and exhibit annexed, given in on the part and behalf of the said Joseph Barter Bloomfield and Robert Slade, the younger, the respondents.

The libel and exhibit given in on behalf of the respondents, from the decree for admitting which, this appeal was interposed, were, *in substance*, as follows:—

1. The first article of the libel pleaded, *that*, on or about the 12th day of December, 1821, several of the parishioners, &c. of the parish of St. James, in the town, and county of the town, of Poole aforesaid, duly met in vestry, pursuant to public notices previously given for that purpose, in order to make a church rate for the use of the church of St. James in the said parish, and the repairs and ornaments thereof, and other matters and things, and relating thereto; and did then and there resolve and order, that a church rate of three shillings in the pound should be allowed the churchwardens accordingly; and that the same should be made *agrecably to the*

*then present poor rate, and according to the usual mode of making the church rate within the said parish.*

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2. The second article merely pleaded the exhibit, in part supply of the premises, annexed to the libel, to be a true copy of the order of vestry, made as pleaded in the preceding article (a).

3. The third article pleaded, *that*, in conformity with such order, a rate of three shillings in the pound agreeable to the then present poor rate, and according to the usual and customary mode of making the church rate within the said parish, was made and assessed on the inhabitants and others of the said parish of St. James, liable to payment of the same, to wit, on the 28th day of December (as would appear by the said original rate, to be produced at the hearing of the cause); that the said rate was subsequently confirmed, under the usual conditions, by the official; and that, in conformity thereto, most or some of the said parishioners, &c. had paid the se-

(a) The exhibit was as follows:—

At a vestry duly holden this 12th day of December, 1821, at the usual place, for the parish of St. James, in the town and county of Poole, pursuant to public notice.

We, whose names are underwritten, do approve and allow of the foregoing account of Joseph Barter Bloomfield and Robert Slade, jun. the churchwardens, by which there appears to be due to the parish the sum of 178*l.* 7*s.* 8*d.*

We hereby order that an assessment or church rate of three shillings in the pound be allowed the churchwardens, and that the said rate be made agreeable to the present poor rate, and according to the usual mode of making the church rate.

(Signed) J. B. BLOOMFIELD,  
ROBERT SLADE,  
GEORGE KEMP, &c. &c.

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veral sums, respectively, assessed upon them in the said rate.

4. The fourth article pleaded, *that* Richard Miller (the defendant) was and is a parishioner of St. James, occupying certain messuages, &c. within the same; and *that*, by the rate so duly made as aforesaid, he was and is justly rated and assessed, agreeable to the usual mode of making the church rate within the said parish, in the sum of 13*l.* 7*s.* in manner following—to wit, for a tenement in Hill Street, of the annual value of 22*l.*, the rate or sum of 3*l.* 6*s.*; for a malt-house in Hill Street, of the annual value of 40*l.*, the rate or sum of 6*l.*, being at the rate of three shillings in the pound for the annual value of the same; and *the sum of 4*l.* 1*s.*, being at the rate of nine shillings for every hundred pounds in value of the stock in trade of the said Richard Miller*, which said several sums, he, the said Richard Miller, should and ought to pay as his proportion of the said rate.

5. 6. 7. 8. The fifth, sixth, and seventh articles, merely pleaded the circumstances usually pleaded, *mutatis mutandis*, in libels for church rate, namely, that Slade and Bloomfield (the plaintiffs or promovents) were duly elected, sworn, and admitted, into the office of churchwardens of the parish of St. James in the said town of Poole, and were such, at the time of making the said rate, and at the commencement of the suit—that Miller, the defendant, though once or oftener requested, refused or delayed payment to the said churchwardens of his proportion of the rate aforesaid; and that he, Miller, was a parishioner of the said parish, within the peculiar and exempt jurisdiction of Great Canford and Poole;



and therefore, and by reason of the premises, was subject to the jurisdiction of the Court. The eighth was the usual, *formal*, concluding article, praying that the defendant might be condemned in the sum so rated and assessed upon him.

*For the appellant—Swabey and Lushington, Doctors, and Mr. Tindal.*

The question at issue in this suit is one of considerable importance, though not, as it appears to us, of equal difficulty. It may be stated, generally, as the liability of *stock*, under the circumstances pleaded, or similar, to payment of church rate—a practice, we apprehend, now, for the first time, submitted to the test of legal inquiry.

The object then of this suit is to enforce a church rate, embracing, among other property admitted to be liable, *stock in trade*. Now we contend that, under the circumstances pleaded, the vestry or churchwardens *must*, in the end, fail to enforce a rate including stock in trade; and, consequently, that this libel, pleading a rate so made, ought to have been rejected.

Is it meant to be pleaded as a "*custom*," in the strict, legal, sense of the word, to rate stock in trade to the church within this particular parish? If so, the pleading is faulty: the "*custom*" should have been pleaded in the usual *legal* mode of pleading a *custom*; and the libel must be so reformed. The legality of a *custom*, so understood, to rate stock in trade to the church within this particular parish, is a question not raised upon the present plea. Indeed were this pleaded as a "*custom*," the first thing to be proved would be its *existence*; which were, either the Court below, or this Court, to pro-

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ceed to try, it would, of course, be ground for a prohibition.

If, however, which we rather suppose, it is meant to be pleaded as *usual*, or a *practice* merely, to rate stock in trade to the church at Poole, we maintain it to be one utterly untenable. It may, for some time, have existed in the absence of opposition: an objection taken to it at any time, must have been sustained.

It *has*, probably, been *usual*, as pleaded, in this parish to include stock in the church rates. But in the instance of *no* former rate (from the small amount in value, possibly, either of the stock rated, or of the rate itself, by reason of the church not requiring any extensive reparation, or for some other cause) does any opposition to this mode of rating appear to have been made. This circumstance leaves the question as to the *legality* of that practice still open. We maintain it, viewed in what light soever, to be clearly illegal.

Church rate is, invariably so held, a *personal* demand indeed—but in respect of *real* estate only; and not in respect of *personal* estate, either alone, or jointly with real estate. We, at least, are aware of no instance of church rate formally levied or imposed, on any other than lands and tenements only. If our opponents are more fortunate than ourselves in the knowledge of any, we shall have the benefit of their discovery: if they are not, this absence, perhaps of all actual, but certainly of all legal precedent, furnishes a nearly unanswerable argument against the legality of the rate now sought to be recovered.

The wisdom of the law upon this head, as we understand it, needs no vindication. All personal property is of a fugitive kind; and stock in trade is one of the most fugitive kinds of personal property. For these, as well as other obvious reasons, it is one of the least proper subjects that can well be imagined of strict investigation, either for this purpose of taxation, or for any other. That it *has been*, and *must again be*, where the law authorizes or requires it, will be readily conceded; but we submit, that the law must authorize and require it, strictly and specifically, *in order to its being* subjected to any such inquisition, with any sort of propriety.

Again, a practice of rating stock *in trade* seems to us *unjust*, as subjecting trade to a demand from which persons not in trade, though having stock (as farmers, for instance) are exempted. It is very unequal too, even as between different trades, some of which require a large stock, and others, comparatively, hardly any, to enable those who pursue, to conduct them advantageously. All these are arguments against any irregular *practice* of taxing stock in trade, being fixed and confirmed, as it is now sought to be, by legal sanction.

The only authority, if authority it be, for rating stock to the church, under any circumstances, which occurs to us, is the judgment of the thirteen civilians assembled at Doctors' Commons, and printed in Godolphin (*a*), which does, in substance, seem to lay it down, as a *general* proposition, that the levy may be, either upon stock, *or* land. We allude to a certain "order or direction," as it is termed, "touch-

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(a) *Repertorium Canonicum*, App. s. 31. p. 11.

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ing the liability of property to the reparation, more immediately of the church and church-yard of Wrotham, in Kent;" but "to be applied generally," as the order expresses it, "upon occasions of like reparations to all places in England whatsoever;" printed as above. Now here, in the first place, by what authority these thirteen civilians met and drew up any such "order," no where appears. Nor further does it appear, at least on Godolphin's shewing, that they ever met, or drew up any such order, at all—a matter which is fairly open to suspicion at least, from the *questionable* character of the "order" itself. It occurs, not in the useful repertory of ecclesiastical law, *as published by Godolphin*, but merely in the appendix set forth, *non constat* by whom, to a second edition of the repertory published by the booksellers, at a time when its author was no more (a). After all, the rate *here* sought to be recovered, derives little or no aid from these "instructions" for making church rates, even admitting them to be genuine. All which *they* purport to sanction is, a levy either upon land or stock—*"even for the best,"* as they phrase it, but not on *both*. Here the rate sought to be recovered is *both* on land and stock.

We are aware that it is usual in places to levy *poor* rate on personalty; but that, we contend, in

(a) Godolphin died 1678 (4th April). The second edition of the "*Repertorium Canonicum*," with the appendix, only made its appearance in 1680. The appendix sets out with stating, that "the former tract being written only by way of essay, it was thought expedient *by the friends of the bookseller* to make some brief additions to this second impression concerning some things that are of daily use." Among these "additions" are this, "order and direction."

no sort infers the propriety of levying *church* rate. Levies to the church are not, like those to the poor, dependant upon, or growing out of, any statute. The general law imposing the reparation of the church upon the parishioners, and of course, at the same time, regulating the levy of those sums necessary to that reparation, must obviously have been settled long prior to any consideration of poor rates; which, it is well known, were unheard of prior to the reign of Hen. 8; and were only placed upon their present footing by a statute late in the reign of Elizabeth.

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Upon these grounds it appears to us that this libel ought to have been rejected in the first instance; and, consequently, that the Court is bound to reverse the order for its admission; and by so doing, in effect, to dismiss the appellant from all further observance of justice in the present suit.

*For the respondents—Phillimore and J. Addams, Doctors, and Mr. W. P. Taunton.*

It is pleaded, and for the purpose of the argument may be taken as proved, that it hath been usual, or the *practice*, in Poole, to levy church rate on personalty, or *stock in trade* (a). The continuance of that *practice* (for as a practice merely, in contradistinction to a legal *custom*, it is, and was meant to be pleaded) is now, for the first time, opposed; and the point immediately at issue is, whether the practice in question has any thing so revolt-

(a) This appeared by the church books, from as far back as 1751. The church books prior to 1751 were said to be lost; and that evidence of their being so lost or mislaid had been given by the vestry clerk of Poole in an action as long ago as 1791.

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ing, on the face of it, as to subject the libel in which it is pleaded to instant and summary rejection.

Our opponents have undertaken to shew that it is a practice of this revolting description, and that if sustainable at all, it could only be in virtue of a strict legal immemorial custom of rating; which custom, however, say they, is not *pleaded*, and the existence of which, were it pleaded, we admit to them that neither the Court appealed from, nor this, the appellate, Court, is competent to try. But that the practice itself in question partakes any thing of the nature or character sought to be ascribed to it, we by no means admit; on the contrary, we are both prepared to deny this, and to sustain that denial by what appear to us valid arguments. For if it is, it must be deemed so, either upon principle or upon authority: but neither the one nor the other of these, in our view of them, seem to sanction any such inference.

And first as to principle—is there any reason, upon principle, why personal property, especially why visible personal property, yielding a profit, within the parish, should not pay to the reparation of the church as well as real property. We are aware of none. Church rates are admitted, on all hands, to be taxes, not upon property so much, as upon persons in respect of property (*a*); and why not upon persons in respect of personal property, as well as upon persons in respect of real property, we, *upon principle*, are at a loss to imagine. *Every* parishioner is bound, of common right, to the repairs of his parish church. “*Ad refectionem ecclesiæ debet OMNIS populus, se-*

(a) 5 Co. 67. 1 Bulstr. 20. Degge, 166.

*cundum legem, subvenire;*" by a law as old as King Canute (a). "*UNUSQUISQUE parochianus,*" say Lyndwood and John of Athon, "*ad reparationem ecclesie tenetur, &c.*" (b) "*All the parishioners and landholders,*" says Degge (c), "are bound to the charge;" apparently distinguishing between the two, and making both liable. Now every parishioner being thus, of common right, and upon principle, bound to contribute to these repairs, why the holder of stock should be exempted to the necessary imposition of a double *onus* upon the holder of land, is to us, upon every general principle at least, wholly undiscoverable.

But it has been objected, and even dwelt upon as a principal head of objection, that the nature of personal property is such as to render levies upon it, howsoever to be applied, if not impracticable, still obviously so inconvenient, that they are not to be resorted to but under some strict or overwhelming necessity. But we submit that no great, if any, practical inconvenience from the levy of *church rate* upon stock need be apprehended. We admit that any tax upon stock must, to a certain extent, be arbitrary and unequal. But the tax itself of church rate is, *ordinarily*, too inconsiderable to render any trifling inequality in its collection a sensible grievance; nor is it necessary to its collection to institute

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(a) Ll. R. Canuti. apud Brompton, Col. 929. The Editor is unable to find any such law among the laws of King Canute, in the great collection of Labbe and Cossart. Vide Concil. tom. ix. pp. 915—935.

(b) Lindwood *De eccl. adif. C. Licet Parochiani v. Reficiendarum Ecclesiarum. Et de officio archidiaconi verb. Reparatione. Johannes de Athon in Othob. C. Improbam verb. Ad hoc tenentur,*

(c) Degge, 164.

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any thing like that *strict* inquisition into the circumstances of private persons, which would brand it as arbitrary, in any perceptible degree, on *that* account. Indeed levies on stock, much more considerable, have, at all times, and continue to be, raised upon the subject, if not possibly wholly unobjected to, yet still without furnishing any *real* matter for complaint. The old "dismes and fifteenths" were assessments on personal property only, originally the actual tenth, or fifteenth, of the subject's moveables; not attended in their levy with any practical inconvenience that we are aware of. The same may be said of "subsidies," which succeeded these dismes and fifteenths, and were levies involving, like the church rate in question, real and personal property in one common assessment, being taxes upon persons in respect of their property, real and personal, at the (nominal) rate of four shillings in the pound for lands, and two shillings and eight-pence for goods. Nay, at this very day, the land-tax, at the usual rate (four shillings in the pound) is a fifth (a *nominal* fifth), not only of the rent of all the land and all the houses, but of the interest of all the stock in the country; that only excepted which is lent to the state, or employed in the cultivation of land.

But apart from any consideration of dismes and fifteenths, &c. as admitting these to be wide of the mark, further perhaps than, at most, in the way of *general* illustration, let us see whether a review of those levies constantly making at this day, throughout the kingdom, for the relief of the *poor*, suggests any thing applicable to this part of the case. For to *levies* of poor rate and church rate the self-same considerations so nearly apply, that, property of any particular description being rated with *sufficient* fa-



*cility* to the former of these, to raise any question about the *difficulty* attendant upon rating property of that same individual description to the latter, would seem almost absurd. Nor, viewed in this light, is the distinction between these, as to their *origin*, at all material; though our opponents have, artfully enough, sought to insinuate, that the one being due under the general law, and the other under a special statute, constitutes so great a difference, as to bar all reasoning *from* the one *to* the other, in all respects. As with reference to the purpose for which we are *now* placing them in juxta-position, that distinction makes no difference in the case whatever.

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The statute of 43 Eliz. for raising poor rates is, evidently, large enough to comprehend all species of personal property, under the term, "*the ability*" of the parish: there is nothing whatever in the statute which limits or confines that term, in this application of it, to *real* property. A series of determinations however, founded on the best and wisest principles, has excluded from rateability to the poor, all personal property not *visible*, and *yielding a profit*: but still leaving personal property situate, locally, within the parish, and at the same time visible, and yielding a profit, liable to poor rates. That series of determinations has done something more; for owing to some inconvenience, partly, perhaps, real, and partly supposed, attending this matter of taxing stock in practice, Courts have *always* (or at least till lately have always (a)) been guided by the

(a) That is, till the Court of King's Bench delivered an opinion upon the general question, which they were long averse to do, determining every case upon its own particular circum-

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usage thentofore had with respect to taxing stock in trade in the place in question. But still, under all these restrictions and modifications, wherever it has been usual, or the *practice*, to assess the inhabitants of any city, town, or borough, for and in respect of their personal property, or stock in trade, to the poor rates, they have uniformly, without a single instance to the contrary, confirmed assessments made upon that principle, and held such personal property, or stock in trade, to be liable. We say wherever it has been the "*practice*:" for it must be obvious that there can be no legal "*custom*" of levying poor rates, which themselves only originated in the reign of Elizabeth—centuries, that is, *within* time of legal memory. It would be idle to enumerate authorities for so well known a position (*a*); but it is material to observe, that here in Poole the poor rates, at this day, are levied upon stock in trade (having, apparently, been so from their very origin), under a decision of the Court of King's Bench, made, specifically, as with relation to this very town of Poole (*b*). Therefore any arguments, *ab inconvenienti*, against rating stock in trade to the church in Poole, *ipso facto*, merge. It is easy to say, in

stances. But the liability of stock to the payment of poor rate seems to be now established as a general principle: so that the Court of King's Bench will confirm a rate, if not otherwise objectionable, including stock, without any reference to the prior usage of the particular place. See *Rex v. Ambleside*, 16 East, 280, &c.

(*a*) Some of the leading decisions are the following—*Reg. v. Barking*, 2 Ld. Raym. 1280. *Rex v. Andover*, Cowp. 550. *Rex v. Hill*, Cowp. 613. *Rex v. Rodd*, Cald. 147, &c. &c.

(*b*) In *Rex v. White and Others*, Trin. Term, 22 Geo. 3. See 4 T. R. 771.

the way of objection, what is stock in trade? how is this to be fixed or ascertained? how, when fixed, is its value to be estimated? and so on—the difficulties attending this mode of rating are all but insurmountable. We reply to all this, that here, in Poole, at least, what is stock in trade *must*, somehow, be fixed or ascertained—upon the value of that stock, when fixed or ascertained, *some* estimate *must* be put—the difficulties, if any, attending this mode of rating, in Poole, *must* be surmounted, in order to the making of levies for the relief of the poor. This, we repeat, is an answer, at once, to all arguments deduced from the supposed inconvenience of taxing stock to the repair of the church, at least, in this particular instance. Levies to the poor, on an ordinary average, exceed those to the church in a vast proportion; and if no practical inconvenience is found to result from levying upon stock those much higher rates, which are necessary to the maintenance of the poor in Poole, surely none is to be apprehended from a continuance of the practice of levying, from time to time, upon that same stock those by far less considerable rates which ordinarily suffice to sustain, and repair, and decorate the single church in Poole.

It should seem, then, that no great inconvenience need be apprehended from laying church rates upon stock, as well as upon land, generally. But, further, we contend, that in Poole *some* inconvenience at least would result were this not so. For we apprehend that *some* inconvenience does, and ever must, attend taxing the parishioners of *any* parish to the poor, upon one principle, and to the church upon another, a contrary, or at least a different principle; considering the close analogy which, we re-

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peat that, these rates bear to one another, in all points respecting (not of course their appropriation, but) their levy.

It is well known to be generally prevalent in parishes that the *church rate* shall be made "*according to the poor rate*," or, in other words, that the latter, as by far the most frequent, and most considerable of the two, shall be taken, to some extent, as a rule and measure of the former. The convenience of this in saving double valuations or assessments, and, consequently, preventing, in many instances, double appeals, and in other obvious respects must, we think, be admitted. Nor is this merely a convenient and very general practice; it is also one which has prevailed *ab antiquo*. This appears sufficiently from the "libels in causes of subtraction of church rate," printed, as precedents, in Oughton, in most of which the rate sought to be recovered is pleaded to have been made "according to the poor rate," or "agreeable to, and in proportion with, the poor's book," for the year preceding, or to that effect. See, for instance, in page 350, where the making of the rate is laid in this form:—"Quod guardiani, sive æconomi, &c. post publicam in dictionem conventus (anglicè a vestry) convenerunt, &c. et (habita consideratione, &c. decasuum et defectuum ecclesiæ, et de pecunia levanda, pro eorum refectione, &c.) statuerunt, et decreverunt, inter se, taxam, sive ratam, imponendam in dictæ parochiæ parochianos, omnes et singulos, qui in rotulo, sive libro, pro sustentatione pauperum censebantur, sive inscribebantur—scilicet, ut quilibet solveret quadruplo summam in dicto rotulo, sive libro, descriptam; ac sic ratam sive taxam fecerunt, in, et erga, re-

parationem dictæ ecclesiæ, (a) &c." But this mode of making church rate, so obvious, so convenient, so prevalent, *ab antiquo*, is impracticable in parishes where "*personalty*," whilst it *must* be included in the one rate, is necessarily, and under *all* circumstances, excluded from the other.

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If then no general objection applies, either to levies on personal property, or stock, generally, or to levies upon it, for this particular object of church repair—nay, more, if it seems that, in Poole at least, *some* inconvenience will attend a departure from the practice of levying church rate upon stock, *more antiquo*, the Court, we apprehend, will be inclined ultimately to sanction the rate sought to be recovered in this suit, and, consequently, of course to admit the present libel; unless, indeed, it can be clearly shewn that, in so doing, it will go counter to the whole stream and current of authority. For if it can, indeed, be said, consistently with legal truth and propriety, that the current of authority is, *uniformly, adverse* to the practice pleaded in the libel; this, in itself, we are constrained to admit, is amply sufficient to constitute a fatal objection to its continuance, in spite of all that can be urged in its favor deducible from general, *secondary*, considerations. But the current of authority, viewed as we view it, does *not* suffer this to be said of the practice in question, with legal truth or propriety. We grant that the prevalent usage is, and may long have been, to levy church rate upon lands and tenements only. We say the "*prevalent usage*;" for we deny its be-

(a) 2 Oughton, *Ordo Judiciorum*, p. 350. See also pp. 327. 364, &c.

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ing the usage, universally, or even nearly so, though our adversaries have represented it as such, to the latter extent at least, if not to the former. *We* are aware, nor have the slightest objection to a disclosure of the names, of very many places, some of equal extent and population, where, as in Poole, a different usage prevails, and where the church rates are uniformly levied upon stock, as well as upon lands. Now "prevalent usage" is not the same thing with positive law; nor is a practice which happens to be at variance with the former, necessarily illegal, from *that* being so which sets itself up in wilful and perverse opposition to the latter. And so far is the current of authority from affirming this non-rateability of stock to the church to be "*law*," without exception or limitation, that it infers (not to say affirms, or goes little short of affirming) a principle the very reverse. We shall, of course, be expected, and are not unprepared, to fortify our assertions upon this head by reference to specific authorities.

And, first, what say John of Athon and Lyndwood, "the antientest and best of our canonists" on this matter of church rate? They, at least, are, decidedly, *ours*; for the words of the latter, as taken out of the former, are distinct, that stock is taxable as well as land. "*Unusquisque parochianus*," says Lyndwood, "*tenetur ad reparationem ecclesiæ juxta portionem terræ quam possidet infra parochiam, et secundum numerum animalium quæ tenet et nutrit ibidem.*" (a) It is so obvious as to render it nearly superfluous to insist, that "*animalia*" stands in this

(a) Lyndwood *De Eccl. Ædif. Et De Offi. Archidiaconi. Et Johannes de Athon in Othob. ubi supra.*

passage for stock of any species, or stock generally. This is so understood by Peck, by Prideaux, and indeed, we apprehend, by all others. Prideaux's words (a) are, "According to the ecclesiastical law that hath prevailed in this realm, the laying of the church rate ought to be according to the lands and the stock [the stock generally] which the parishioners have within the parish; and so say John of Athon and Lyndwood [namely, in the passage just cited, which then follows in Prideaux], the antientest and best of our canonists." Peck (b), in a commentary on this same passage out of Lyndwood, explains it in the same sense, and plainly construes it as sanctioning rates on parishioners for church repairs, "*pro modo et ratione rerum suarum*," or "*pro modo et facultate bonorum*," as he styles it in different passages, both to the same effect. Indeed flocks or herds "*animalia*," constituted at that time the very principal, not to say the sole, stock. Tradesmen with any thing like stock to be taxable in the modern acceptation of the term, stock in trade, there were plainly, at that time, few or none. The only tradesmen at that time, except, perhaps, in some few cities or great towns, were people who used to travel about from fair to fair, like the hawkers and pedlars of modern times. Their wares [stock in trade] could of course be subjected to no parochial (local) burthens. Taxes used indeed to be levied upon these, known by the several names of "passage," "pontage," "lastage," "stallage," &c. (c); but these were in the nature of transit duties, as at certain passes

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(a) Directions to Churchwardens, p. 63.

(b) *De Ecclesiis Reparandis*, C. x. & xi.

(c) Brady's History of English Boroughs, p. 3.

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or bridges, or of tolls, as for the erection of booths, or stalls, in particular places—the collection of which in no sort argues them fit, or capable even, subjects of local taxation.

It clearly results then that “*stock*” was liable in the opinion of Lyndwood and John of Athon; and it either has appeared, or will presently appear, that with Lyndwood and John of Athon, those “*antientest and best of our canonists,*” as Prideaux styles them, upon this head, the principal text writers on our national ecclesiastical law, as Prideaux himself, Gibson, Degge, Watson, and others, in substance, concur. But are these the only authorities for our position? Far from it. It may be fortified, we contend, at least by plain inference and deduction, from authorities for which we are not driven to resort to civilians or canonists; although these last, it is to be observed, are, if the phrase be allowable, the natural authorities, to which upon a matter like this of church rate, recourse is to be had.

Cases that involve questions of litigated church rates, are not of any frequent recurrence, as might naturally be expected, in reports of cases at *common law*. It is singular, however, that the very earliest of such cases which we have been able to discover (in substance, as follows) is one, that distinctly recognizes the rateability of stock. It occurs in the shape of an action of replevin, which came before one of the Courts at Westminster, in Trinity Term, 44 Edw. 3, where the party, who had distrained the plaintiff's goods, justified his act by pleading, “*that the parishioners of E. had made or levied a church rate, of sixpence on every carucate of land, a penny farthing on every cow, and a farthing on every ten*

sheep, in order to raise a sum of 10*l.*, necessary to the reparation of the parish church of E.; and, further, *that* they had ordained two collectors, whereof the defendant was one, with power to distrain on parties who were liable, but refused, to pay—*that* the plaintiff was a parishioner, &c. and had land, cows, and sheep, for which he was duly assessed in a certain sum, to wit, nine shillings; and that, refusing to pay, the defendant had distrained his goods—and that such had always been the custom." The plaintiff, first, objects to the validity of the custom, so pleaded, *to distrain*; but the Court over-ruling this objection, he is then compelled to reply, merely, "*that* the parishioners never assented to the rate"—and upon that issue, namely, whether a majority of the parishioners ever assented to the rate in question, the parties go to trial—the validity of such rate, *if* made with the assent of a majority of the parishioners, being thus fully admitted; nor seeming, indeed, ever to have been questioned, as by reason, *that is*, of its purporting to include *chattels* (a).

But, in looking to the series of common law reports, we are at no loss for cases which recognize the rateability of stock to the church, at least by necessary intendment and implication. We allude to those cases in common law reports, in which distinct levies appear to have been sanctioned—the one for the repair of the fabric of the church, the other for the ornaments. For instance, we may refer to that known as the "Churchwarden's case," in the 20th of James I, reported by Rolle (b); the rule collected out of which by Rolle, the reporter, him-

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(a) Year Book, Trin. Term, 44 Edw. 3. 13.

(b) Roll. Rep. 153.

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self, in his Abridgment (*a*), is, what he also says was expressly laid down by the Chief Justice in that case; viz. that "for repairing the fabric of the church, the charge is *real*, and charges the land, and not the person; but for the ornaments of the church, it is *personal*; upon the goods, and not upon the land:" and this distinction, he goes on to say, has been observed in other cases.

From these cases, a position has been drawn by text writers, as by Rolle himself again, in his Abridgment (*b*); by Sir Simon Degge, in his Parson's Counsellor (*c*); by Bishop Gibson, in his Codex (*d*); by Dr. Watson (or Mr. Place), in his Clergyman's Law (*e*); by Dr. Wood, in his Institute (*f*), &c.—as if there should be, properly, *two* rates—one upon land and houses, which should concern the freehold of the church, the other upon personal estates and stock [the very words of Wood], to defray other expences. This, however, they say, would create confusion, and so is seldom practised. We concur with them in their implied censure of this practice, as apt to "create confusion;" but we do not collect from it, either the necessity, or their approval, of exempting stock from paying to the church altogether. They, in effect, say, instead of two rates, one upon "lands," for the "fabric," and another upon "goods," for the "ornaments," or for "other expences," blend the two into one, and make one rate

(*a*) 2 Rolle Abr. 262. 270. 291.

(*b*) Ibid.

(*c*) Degge, 166, &c.

(*d*) Codex, 196.

(*e*) Addenda, 642.

(*f*) Page 90.

serve for both. But is not *this* matter of *fair* inference ; namely, that in *their* apprehension that one assessment should be upon goods, as well as land ? *Otherwise*, the principle of rating stock to the church, altogether, is departed from, upon no reason that we see, but, certainly, without any necessity.

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It should seem, then, that, either explicitly, or by implication, this rateability of stock has been recognized in a series of cases at common law, out of which a principle to the same effect has been extracted, as by Rolle, and Wood, and others, who hardly come within the description of civilians or canonists. But, by aid of these last, the natural authorities upon questions of church rate, this notion of the absolute non-rateability of stock to the church may be clearly refuted. The authorities of Lyndwood and John of Athon, for rating stock to the church, have already been cited ; and the principal writers upon our national canon law have been shewn to concur with them in this. The "order, &c." in Godolphin (*a*) warrants an assertion, that no doubt as to the liability of stock existed among the civilians of that day. Some opprobrium has been attempted to be thrown upon this "order, &c." as if not really emanating from the authority to which it is ascribed. We can only say, that had this been so, it *must* have called forth something in the nature of a *disclaimer*, from the learned persons whose names are set to it—which that it never did, we are authorized to presume, from finding it quoted by Prideaux, and other almost contemporary writers, without intimating any suspicion of its integrity.

(a) Appendix, s. 31, *ut supra*.

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It is observable, too, that it is not set down as an "order, &c." made by *thirteen* civilians assembled at Doctors' Commons, &c. *merely*—but as an "order, &c. made by Dr. King, Dr. Lewen, Dr. Lynsey, Dr. Hoane, Dr. Sweit, Dr. Steward, (*nomination*), and other Doctors of the civil law, to the number of thirteen, so assembled." As to the distinction, "land *or* stock, but not both," *this* does not appear to us so unreasonable as to warrant the order itself being treated slightly, upon *that* account. The only stock in question *must* have been "farming stock." What, a century and a half ago, could the "stock in trade," at *Wrotham*, have been? Now, as to farming stock, we apprehend the distinction to be highly reasonable. Stock, to a certain extent, is absolutely essential to the proper cultivation of the farmer's land; so that were this (farming) stock to be rated—the land being *also* rated—the farmer would, in effect, pay twice for the same thing. And the phrase, "all places in England," in the "order," must, in reason, be restricted to "all places in England similarly circumstanced with Wrotham in this respect"—Wrotham being the direct, immediate, subject of the order. We, however, have no concern, either to ascertain the origin of this distinction, or to vindicate its propriety. All that *we* refer to the "order" for, is, to shew that no such notion as that of the absolute and essential non-liability of stock to the payment of church rate (upon which our opponents have been forced to take their stand in arguing against the admissibility of the present plea), prevailed in Doctors' Commons at *that* day: which that this "order" is effectual to, who can doubt?

But to dwell no longer upon authorities from text writers, let us briefly consider what the practice, the admitted, recognized, practice, as it should seem, of ecclesiastical courts in this particular suggests, as with relation to the present question. Has *that* been uniformly adverse to the rateability of stock, of all descriptions, to the repair of the church? Certainly not. We admit, that, if challenged to produce any instance in which the rateability of stock to the church has been solemnly pronounced *for*, we are unprepared with any; and for the obvious reason, that the legality of this has never, that we are aware of, been questioned at law. Our opponents are, at least, *as* unfurnished, with any instance of a sentence *against* its legality. This, to be sure, is no answer to a challenge to produce a sentence in its favour, if rating stock really be, as said, a thing unheard of in legal practice. But to maintain this argument, it must first be shewn, that rating stock is a thing unheard of in legal practice—and *we*, on the contrary, not only proclaim, but can prove, it to be, quite the reverse. In many parishes, possibly, stock has never been so rated—in others, where it once was, it has since ceased to be by consent—in others, again, where it once was, nor has ceased, by consent, it still continues, to be rated: and this is the first instance of an individual stepping forward to allege the *illegality*, and to object, on that ground, to paying his proportion, of the rate. Poole is one place, among many, in this predicament—the practice in *all* which, hitherto used and approved, is now, for the first time, sought to be unsettled by a sweeping decision against the rateability of stock to the church, merely, for any thing

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that appears, to gratify the caprice, or litigiousness, or what else, of certain individuals of Poole in particular, of course *against* the expressed wish and consent of a *majority* of the inhabitants of Poole even. Poole, too, we shall take leave to observe, is one of the last places where an experiment like the present ought to have been tried; as the omission of stock, in *Poole*, would, from known local circumstances, throw the burthen of these assessments on those least able to bear them, and would press upon the few landed proprietors with very considerable hardship indeed—and this, the more especially, *now*; when rates are in a course of being levied, for the payment of a large debt contracted by the parishioners for actually pulling down, and rebuilding, the parish church—a debt, no doubt, so contracted by the parishioners, in the faith of their ability to make rates for the discharge of the same, *more antiquo*, that is, including stock in trade. But to proceed,

Among the precedents in Oughton, already referred to for another purpose, are libels in suits of this description, both asserting, in terms, the rateability of stock to the church, and proceeding upon that rateability, without any such affirmance, as deeming it fully admitted. For instance, in vol. ii. p. 351, is furnished, as a *precedent*, a libel in a cause of subtraction of church rate, purporting to have been instituted by the Churchwardens of Richmond, in Surrey, against one Southwell, in the Consistory Court of the Lord Bishop of Winton. In this libel it is pleaded [art. 1.] as follows:—“*Imprimis, Quod tam de et ex quibusdam constitutionibus provincialibus [quarum una sic incipit—Ut Paro-*

chiani, &c. altera vero sic incipit, Licet Parochiani, &c.] quam ex longa, laudabili, legitimeque præscripta consuetudine, a tempore immemorato hucusque inviolabiliter et inconcusse usitata et observata, ac in CONTRADICTORIO JUDICIO SÆPIUS, seu saltem semel, OBTEANTA, Parochiani cujuslibet Parochiæ Cantuariensis Provinciæ, terras, tementa, POSSESSIONES, BONA, JURA et CREDITA in eadem habentes, oblinentes, et possidentes, (consideratis possessionum suarum PRÆDICTARUM quantitibus) ad reficiendum, restaurandum, et reparandum easdem ecclesias suas parochiales, et ad quævis alia onera, quando et quoties opus fuerit, contribuere et pecunias suas exponere, tenebantur et tenentur (a)." In the same book, page 347, again, is a libel (purporting to have been delivered, in the *Court of Arches*, in a suit of this description, between the Churchwardens of Mestham, within the deanery of Croydon, &c. and Best, a parishioner), in which, to be sure, the law, as above, is not *formally pleaded*, but in which it is proceeded upon as *fully admitted*—a circumstance, we submit, which renders this precedent still more in favour of our argument, than even the one to which we before referred. This libel [art. 1.] pleads the rate sought to be recovered to have been *made* (without any previous formal pleading of the law, in conformity with which it was so made), on the several parishioners and inhabitants "*juxta et pro rata BONORUM, et terrarum, et FACULTATUM suarum infra dictam parochiam.*" The second article pleads, *that* Best, the defendant, at the time of laying this rate, was a parishioner

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(a) Oughton Ordo Judiciorum, vol. ii. p. 250.

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of Mestham, "*ac BONA terras, et FACULTATES, ibidem habuit, occupavit, et possedit*"—and the third article, that he was rated, at such a sum, "*habitu consideratione FACULTATUM et conditionis ejus(a)*." Those which follow are the usual articles, of the defendant being within the jurisdiction of the Court, &c. &c. and need not be stated.

The inference furnished by these precedents, against the position contended for by our opponents, of the non-rateability of stock to the church, is too obvious to be insisted upon. If it be objected, that the libels cited are mere printed forms, *non constat* whether ever *exhibited* even, still less whether ever *admitted*, in any court, it might be sufficient to reply, *that* had but a *plausible* ground, or grounds, of objection to their admission been apparent upon the face of these, Oughton could hardly have suffered them to stand in his book of "*precedents*," to the necessary defeat and mortification of all who might be led to adopt them *as* such. But what if we should be able to prove, from a series, not of printed forms, but actual cases, that rates made upon similar principles have been pleaded in suits for subtraction of church rate, in numerous instances—that, not merely such pleas themselves have been tendered and admitted, but that, payment of the rates specifically pleaded *in* these, has been resisted with all conceivable art and industry—that, in the progress of such suits, objections have been heaped upon objections—that from decrees in such suits, appeals have been prosecuted upon appeals—that in the course of such, prohibitions have been

(a) Oughton Ordo Judiciorum, vol. ii. p. 347,

applied for, under which *all* the proceedings have been submitted to courts of common law, whilst presided over by Judges of the first ability—and yet, with all this, that, apparently, it never once occurred, either to any court to suggest the invalidity of these rates, or to any individual to resist the payment of them, *as by reason of their purporting to be levied upon stock as well as land?*—why then, we apprehend, that the admissibility of this libel admits of no further question; unless, indeed, it can be shewn, that what *was* the law, *then*, upon this head, is not the law, *now*; that is, in other words, unless it can be shewn that, in the interim between the time when those cases occurred and the *present*, the law in respect to levies of *church rate* has undergone, *something* at least in the shape of, *authoritative* alteration.

It only remains, then, to shew, that a series of cases warranting these deductions, is actually producible—with which view, we solicit the Court's attention to the following, the whole of which are furnished from processes extant in the registry of this Court, the Court of Delegates. The libels pleading the several rates plainly purport such rates themselves to have been levied, in some shape or other, upon *stock*—and the rest, we submit, to be clearly implied, by the proceedings had, together with the defence or defences set up, in each several case. And we put it to the Court, with some confidence, whether a question being mooted as to the rateability of stock in no one of these cases, does not fully warrant *this* conclusion, namely, *that* such its rateability was, *at that time*, actually considered to admit of none, as well by parties and practitioners, as by the Courts,

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themselves, both of civil and common law. And we further submit, *that* the libel in each of these cases is a precedent, directly in point, for the admissibility of this in the present, and involves the affirmance of a legal position the very contrary of that upon which the objections urged *against* its admissibility have mainly, if not solely, relied. And first, as to the libels in the several cases.

The first case, then, to which we refer the Court for this purpose, is that of "Freggleton and Hubbolt, against Acton" (a). The libel here is, *substantially*, as follows.

1. and 2. The first and second articles contain merely the necessary formal averments, of the defendant, Acton, being a parishioner of Claverly; and the promovents, Freggleton and Hubbolt, the churchwardens.

3. The third article pleads, *nearly* in conformity with the first precedent from Oughton, "*Quod tam de et ex quibusdam constitutionibus provincialibus quarum una incipit—'ut parochiani' altera vero 'licet Parochiani'—quam ex longa, laudabili, legitimeque prescripta consuetudine a tempore immemorato huc usque inviolabiter et inconcusse usitata et observata, AC IN CONTRADICTORIO JUDICIO SEPIUS OBTEANTA, Parochiani cujuslibet parochiæ Cantuariensis provinciæ terras, tenementa, BONA JURA et CATALLA et CREDITA in eadem obtinentes habentes et possidentes, consideratis quantitibus possessionum prædictarum, ceterorumque emolumentorum suorum, ad reficiendum, restaurandum, et re-*

(a) "Freggleton and Hubbolt" (churchwardens of Claverly, in the county of Stafford and within the peculiar jurisdiction of Bridgnorth) "against Acton."—Delegates, 1699.

parandum easdem ecclesias suas parochiales, et ad quævis alia onera et ornamenta earundem, quoties et quando opus fuerit, contribuere, et pecunias suas expendere, tenebantur.

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4. The fourth article pleads, in substance, that Claverly church being out of repair, &c. a "lewne," or assessment, was required, to the amount of 28*l.* 10*s.*, or thereabouts.

5. and 6. The fifth and sixth articles plead the notice of vestry, &c.

7. The seventh article pleads, the making of the rate sought to be recovered in these words—that on such a day "the minister and churchwardens, together with other the parishioners, at the time and place appointed, met together, and by them a general lewne and assessment, for the uses aforesaid, was agreed upon, and indifferently and proportionably set down to be paid by the said parishioners of Claverly aforesaid, for and towards the uses aforesaid, unto the churchwardens for the time being, *according to the quantity and quality of their several lands, goods, and chattels*, which every of them held within the said parish; and that the said lewne hath, accordingly, been justly and duly paid by all, or the major part, of the said parishioners."

8. The eighth article pleads, "that the said Thomas Acton had held, occupied, and possessed, within the said parish of Claverly, divers *lands, houses, and tenements, goods and cattle*; for, and in respect whereof, he, the said Thomas Acton, in the aforesaid lewne was, indifferently and proportionably, rated and assessed, for and towards the uses aforesaid, in the whole, at, and in, the sum of 1*l.* 4*s.*, of lawful money of England."

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In "Ash, against Williams and Smith" (a) (not to state *all* these with the same particularity as the foregoing) the libel is express, that every person is liable to the payment of church rate, having "*terras, tenementa, possessiones, BONA, JURA, et CREDITA, consideratis possessionum, jurium, BONORUM, emolumentorumque suorum quantitativibus*:" [Anglicè, according to the quantity and quality of their *lands, goods, and chattels*] and Ash, the defendant, is expressly pleaded to be rated towards the reparation and restoration of the church in question [that of Pembridge], and the ornaments thereof, "in respect of divers *lands, houses, and tenements, goods, chattels, and credits, within Pembridge aforesaid.*"

In "Woodward, against Makepiece and Ladbrook," (b) (a proceeding by articles; and, therefore, *a fortiori* to our purpose, from the known strictness in point of pleading, &c. requisite in *criminal* suits of all descriptions) the articles, which here stand in place of the libel, plead the general law thus—*quod "omnes et singuli quicunque facultates, possessiones, sive prædia, in quibuscunque parochiis provinciæ Cantuariensis habentes, obtinentes, et possidentes, IN IPSIS DECENTES AUT ALIBI, ad reparandum Navem ecclesiæ parochialis ejusdem, una cum campanile, campanis, et fulcro pro compensura earundem* (c),

(a) "Ash against Williams and Smith" (churchwardens of Pembridge, in the county, and within the diocese of Hereford)—Delegates, 1685.

(b) "Woodward against Makepiece and Ladbrook" (churchwardens of Dasset Magna, alias Burton Dasset, in the county of Warwick, and within the diocese of Lichfield and Coventry)—Delegates, 1691.

(c) That is, "The nave of their parish church, together with the belfrey, the bells, and the beams, or frame, for suspending

fuerunt et sunt astricti, cogendi, et coercendi. Et hoc est verum, &c." And the making of the actual rate is pleaded *thus*—that the parishioners in vestry assembled, levied "*taxam, censum, ratam, sive impositionem de et super parochianis dictæ parochiæ, aliisque quibuscunque terras, BONA, domus, sive FACULTATES, infra eandem parochiam habentes, possidentes aut occupantes, quantitativis terrarum, BONORUM, domuum, et FACULTATUM uniuscujusque in ea parte taxandi, consideratis.*"

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In "*Cuthbert against Simmonds*" (a) (a proceeding also, like the former, by articles) the pleading is, *that* the parishioners meeting in vestry pursuant to notice, &c. did "rightly and duly make a rate, tax, or levy, wherein they did justly and equally rate and tax every parishioner and inhabitant of the said parish [Northmerston in Bucks] according to his estate, or the number of acres, and yard-lands, or *stock*, any person had, held, or possessed, within the said parish, after the usual way of rating the parishioners towards the repairs and charges aforesaid." And the articles then proceed to charge and object that he, the said Cuthbert, the defendant, rents so much land within the parish, "and keeps a considerable stock of *sheep, cows, and other cattle,*" for and in respect of which he ought to be taxed and rated.

In the case of "*The Churchwardens of Louth*

these." It was for refusing to pay his proportion of a rate towards "a re-casting, &c. of the *bells,*" that the appellant in this case (the defendant in the first instance) had been proceeded against.

(a) "*Cuthbert against Simmonds,*" (churchwarden of North Merston, in the county of Bucks, and within the diocese of Lincoln)—Delegates, 1696.

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against Atkinson," (a) the libel (for *this*, again, like the two first, was a civil suit) pleads, art. 4. *That* "Louth is a place of great trade and traffic, wherein one or two markets are weekly kept, and two or more general fairs are yearly held; and the inhabitants of which are, for the most part, tradesmen, that keep general shops, and live by a free and general trade."

5. The fifth article pleads it to have been a custom, anciently kept and observed within the parish of Louth, "to make the taxes and rates for the repairs of the parish church there, and the common charge of the churchwardens, at the discretion of the inhabitants and parishioners; and therein to charge as well *tradesmen*, as occupiers of land and keepers of *stock* and *cattle*, going, lying, and being in the said parish, according to their *ABILITY*, due regard and consideration being had to every man's trade and profession, and to the value of the lands and *stock* every one hath in his own occupation."

6. The sixth article pleads the rate to have been made upon this principle, truly and indifferently, after due notice.

7. The seventh article pleads, *that* "when the said rate was made, and for several years before, the said David Atkinson was a freeholder of Louth, and had an estate which he occupied and stocked, to the value of 50*l.* a year and upwards;" and that, "over and above the said stock kept upon the said ground, he also then, and for several years before, did keep, and had kept, a very great number of *cattle* upon

(a) "Guardiani de Louth [county and diocese of Lincoln] versus Atkinson,"—Delegates, 1688.

the commons belonging to the said parish;" and then goes on to plead, *that* in respect of the several items, he the defendant "was duly assessed in the sum of forty-seven shillings for his rate and proportion to the said tax."

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In "*Welby against Abbot*"^(a) the libel pleads [art. 3.] "*That* the town of Boston is a sea-port town, and a town of great trade and commerce, and also a borough town, incorporated with a mayor, aldermen; and common councilmen, and also is very populous: *that* several of the inhabitants are gentlemen, and have good estates, but the generality of them are tradesmen that live by their trades, and are chiefly assessed to the church assessments, according to their way of trading; whereas, were they to be assessed according to the rents they sit on, and by any other way than *by will and doom*, which is the constant way of making and levying such assessments in the said parish, their contributions thereto would not raise and advance so much money as they do; and *that*, moreover, the greatest burthen of such assessments would then fall upon such as are not well able to bear the same:"—and

The fourth article pleads, *that*, it being necessary to raise 125*l.* for repairs, &c. the parishioners agreed, in vestry, to nominate three persons (who are specified) *assessors*, according to the usual way and manner—who, subsequently, laid the assessment by *will and doom*: "i. e. having due regard to every one's estate, quality, ability, way, and circumstances of living;" and therein duly assessed the defendant, *Welby*, in so much.

(a) "*Welby against Abbot and others*," (churchwardens of Boston, county and diocese of Lincoln)—Delegates, 1706.

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Such, in substance, are the libels in these several suits, from which it plainly appears that the rate itself, the subject of the suit, in each, purports, in some shape or other, to include or affect stock. And that this objection was resorted to in *no* case, as *one* of the means (of which *various* were used in each), to assail the legality, and so to avoid the payment of the rate, as clearly results, from the defence or defences set up, and the proceedings had in each several suit.

It would be tedious, however, and, at the same time, we apprehend, quite unnecessary to state, and comment upon, the specific ground of opposition taken in each of these cases, and the proceedings had in each, severally, *in detail*. As for these latter, the very circumstance of each of these cases having found its way through, at least, *two* inferior courts^(a) to the court of last resort in these matters, is ample to shew, that the opposition to the rate in each, upon whatever grounded, if not commenced in wisdom, was at least kept up with vigour. The *general nature* of the defence set up will sufficiently appear from the following abstract of the objections taken to the rate in each of the above cases:—

In “Freggleton and Hubbolt against Acton,” the objection taken is, to the defendant being charged with respect to certain lands, formerly in the demesne of Master Gatacre, which, it was insisted, were not liable to be rated to the church by reason of their being obliged to keep in repair two chancels adjoining the church. In “Ash against Williams and Smith,” the ground of objection, stated in two

(a) Namely, the Diocesan Court, and the Court of Arches.

words, is, "general inequality." In "Cuthbert against Simmonds" it is, *that* he, the defendant, rented the glebe land of Dr. Say, the impropiator, who had lately been at large expence in repairing the chancel; and, therefore, that neither he, nor his tenant, ought to be taxed or rated, in *any* rate, *for the aforesaid parsonage and glebe land*, towards the reparation of the church. In "Woodward against Makepiece and Ladbroke," the following is the defence; namely, *that* the vestry had been held without due notice, in which *any* "*re-casting* of the bells" had been agreed upon; and that the churchwardens, *mero motu*, had departed from the order of vestry by re-casting the old bells into six instead of five, whereby the bells themselves had become so reduced in point of compass, that he, the defendant, whose land was situate at some distance from the church, was unable to hear, and, consequently, was deprived of the fair use and benefit of them. It is also observable, that in this case of "Woodward against Makepiece and Ladbroke," a prohibition was moved for in the Court of King's Bench, still, however, upon a quite distinct ground, namely, that of a citing out the diocese—a prohibition ultimately refused, for reasons that need not be stated, by the whole Court of King's Bench, with that eminent person Sir John Holt at its head (*a*)—this, however, like the rest, tending completely to shew the determined opposition made by the defendant to payment of the rate. In the case of "the Churchwardens of Louth against Atkinson," again, the *principal* ground of opposition is "general inequality." Its more particular nature

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may be inferred from the defendant's answers (subsequently shaped into an allegation, upon which evidence was taken); which answers admit the custom of Louth to be, as pleaded, but deny the necessity of a rate to the amount sought to be raised; and further say, *that* "the churchwardens, together with a select and confederate party of the parishioners of Louth, which were neither of the better sort and quality, or major part of the parishioners of Louth aforesaid, *upon a free vote, did, by will and doom, and unjustly, and illegally, make the rate in question, without any due consideration had, either of the ability of the party taxed, or value of the lands and goods, or stock, every one had, farmed, and kept in the said parish, to the great oppression of the major part of the parishioners and inhabitants of the said parish.*" Lastly, in the case of "*Welby against Abbott,*" the objections are, 1st. *that* he, Welby, "is no house-keeper, but merely a tabler [i. e. a boarder] in Boston, resident with his sister, Mrs. Rebecca Welby;" 2dly. *that* "laying the assessment by will and doom is arbitrary, and contrary to the legal and equal way of laying assessments, viz. by pound rent, or upon land and stock, or separately, as persons shall most abound in;" as, also, that the said assessment is "manifestly unequal," &c. &c. In this case another, more technical, objection, seems also to have been partly relied on, namely, that the presentment of the defendant Welby for non-payment of the rate (the *foundation* of all the subsequent proceedings) was by the name of *John*, not *Henry*, the true name, to which it was only altered in the course of the proceedings—an objection, again, serving clearly to shew that this defendant, like Wood-


ward in the prior case, stuck at nothing to assail the legality of the rate, or, at least, to avoid the payment of it in his own particular person.

We shall trouble the Court but with one case more, that of "*Watkins against Seaman and Webb*," (a) suggesting the same conclusion, though from somewhat different premises. *There* the rate purports to be levied in the *most usual* mode, even at *that* time, namely, upon lands and tenements only; and the objection, the principal objection rather, to the legality of the rate in that case actually is, the circumstance of stock *not* being rated. The allegation responsive to the libel pleading the rate, specifically charges, "*that* Walter Lawrence, clothier, has 400*l.* stock, for which he is not rated—*that* Zachariah Hyett has personal estate worth 500*l.*, for which *he* is not rated," and so on; and distinctly denies the legality of the rate, by reason of its omitting to rate the said stock. What ultimately became of this objection, *we* have no means of ascertaining; nor is it at all material that it should be ascertained. For supposing it, for argument's sake, to have been over-ruled by *all* the several Courts to which it was successively addressed, even that supposition which is, obviously, the one *least favourable* to our case, still suggests *nothing adverse* to it. For *our* case is, not that personalty, of all descriptions, is liable to payment of church rate in all *places*, and under all circumstances, but only that personalty of one particular description, namely, stock in trade, *is* liable to payment of church rate in Poole, under the circum-

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(a) "*Watkins against Seaman and Webb*," (churchwardens of Payneswicke, county and diocese of Gloucester)—*Delegates*, 1685.

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stances pleaded in the present libel. Meantime this, like the former cases, warrants a conclusion that no notion of the non-rateability of personalty to the church, under *all* circumstances, prevailed at *that* time, how rife and familiar soever it should seem to be, in a certain quarter, at the present.

Upon the whole then we submit, that of the two mediums through which our adversaries have sought to establish the inadmissibility of the present libel, the first, the supposed inconvenience of the practice pleaded in it, proves to be a mere nothing—while the second, its supposed illegality, as deduced from the equal and similar absence, first, of authority in its favour, and, secondly, of precedent for its use, rests upon two assertions, both of which have been clearly shewn to be totally unsupported by the fact.

If an objection be taken to *our cases* in support of the practice which we contend for, as by reason either of their scarcity in point of number, or their remoteness in point of date, be it remembered, that they are all derived from the registry of a single court—that court, too, the court of ultimate appeal in such matters, into which questions of litigated church rate can *rarely* be expected to have travelled, at any time; while in modern times, for obvious reasons, the instances are *extremely* few. The number of these within the last century, perhaps does not exceed six or eight—only two have occurred within the last seventy years. It is true, that a cursory inspection of the processes in most, perhaps the whole, of these suits, has *not* led us to suppose, that the rate sought to be recovered in any one of them was a rate including stock. But this, again, infers nothing *adverse* to the rate, the sub-

ject-matter of the *present* suit; for we have admitted, and still admit, that the *prevalent* usage is, and has long been, to levy church rates upon lands and tenements *only*.

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Which contrariety, so admitted, of the rate set up in this libel, to "*prevalent usage*," appears to us the only even plausible objection to its admissibility, not already fully obviated in the course of the foregoing reply. To this, if still insisted upon, we answer, *that* if here, in Poole, as in most places, church rates had been *usually* levied on lands and tenements alone, so that *this* suit were to recover ~~at~~ a church rate now, for the *first* time, including stock, the objection would, undoubtedly, be one of great weight, and might, **PERHAPS**, *even* of itself, be sufficient to enure to a defeasance of the suit, by the rejection of the libel, in the first instance. But the object here is not to originate a new, or even to revive an obsolete, mode of rating, but it is merely to continue one which, *quoad* Poole, has been uninterruptedly used and approved, from time whereof "the memory of man," in the actual, though not, perhaps in the *legal* sense of the phrase, "runneth not to the contrary." Now, it does seem to us, that the present question of church rate—a church rate including stock—under *such* circumstances, presents to this Court a very similar aspect to that which questions of poor rate including stock, long presented to the Court of King's Bench. And we humbly submit, that the safest and wisest course for this Court to pursue is, to abide by the precedent set to it *by* the Court of King's Bench, in its treatment of such questions of *poor rate*; the upshot of which will be, *that* the

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Court will suffer evidence to be taken upon the present libel; and, the usage or practice of Poole, in this particular, being proved or confessed to be as pleaded, that it will, ultimately, be pleased to sanction levies of church rate, upon stock in POOLE—leaving the question of its liability to payment of church rate *generally*, open, if mooted at any future period, to future inquiry; that being a question upon which a sentence to the purport which we solicit, not only, obviously, *determines* nothing, but which it seems to us not calculated, in the slightest degree, to prejudice or affect.

The leading counsel for the appellant having waived his privilege of being heard in reply to the cases, the Court, after some deliberation, made the following

DECREE.

The Judges having heard the libel and exhibit read, and advocates and proctors on both sides, by their interlocutory decree, pronounced against the appeal; and that the Judge from whom the same is brought hath proceeded rightly, justly, and lawfully; and they affirmed the decree or order appealed from—but, at the petition of the respondent's proctor, they retained the principal cause.

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*(An Appeal from the Court of the Peculiar and Ex-
empt Jurisdiction of Great Canford and Poole(a).)*

THE Judges who sat under this commission were,

Mr. Justice HOLROYD (b),
Mr. Justice BURROUGH,
Dr. ARNOLD,
Dr. JENNER,
Dr. DAUBENY,
Dr. MEYRICK, and
Dr. HAGGARD.

THIS, in the first instance, was a proceeding by articles in the Court of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, promoted, in virtue of his office, by the Worshipful and Reverend Charles Bowle, Clerk, Master of Arts, Principal Official of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, against James Seager, Esq. of the parish of St. James, in the town and county of the town of Poole. It commenced in the Court below by a citation, issued on

An allegation responsive to articles in a cause of office, promoted by the ordinary of a royal peculiar, calling upon the defendant, 1st. to answer to "having set up a monument in a church in his jurisdiction without a faculty; 2dly. to shew cause why he should not be decreed to remove the same—pleading, 1st. "that the said monument was erected by

(a) See note (a), page 499.

(b) Mr. Baron Wood was named at the head of the commission; but had resigned his seat on the Bench, as one of the Barons of his Majesty's Court of Exchequer, prior to, and was not present at, the hearing of this appeal.

leave of the minister and churchwardens;" 2dly. "that it was ornamental to the said church, instead of injuring it, or disfiguring it"—admitted to proof.

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the part of the said Official, calling upon the defendant to "answer certain articles, heads, or interrogatories, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, to be objected against him by virtue of his (the said Official's) office: and, more especially, for his having illegally erected and set up, or caused to be erected and set up, in the church of the said parish of St. James, a certain monument, of considerable dimensions, to the memory of his late wife, and of others, by his own mere authority, in usurpation of the power of his ordinary, and without any legal licence or faculty first obtained for that purpose: and *also*, to shew good and sufficient cause (if he has or knows any) why he should not be decreed to remove, or cause to be removed, such monument, as having been so erected and set up, without the licence or faculty of his ordinary, or other lawful authority in that behalf." The appeal to this Court (the Court of Delegates) was against an order or decree made by the official (the promovent), *rejecting* a certain allegation brought in on the part of the defendant, responsive to the articles.

Of the tenor of the articles, it is sufficient to say, that it precisely accorded with that, already described, of the citation. That of the "responsive allegation," the subject of the appeal, was as follows:—

1. That the said James Seager, party in this cause, now is, and for many years last past hath been, a principal parishioner and inhabitant of the parish of St. James, in the town and county of the town of Poole, within the Peculiar and Exempt Ju-

risdiction of Great Canford and Poole, in the county of Dorset; and that, in or about the month of January, in the year of our Lord 1822, Amy Seager, wife of the said James Seager, having departed this life, was interred in a vault in the church-yard belonging to the said parish church of St. James, in Poole aforesaid—that he, the said James Seager, did thereupon cause to be erected and set up, in the said church, near his own pew, at the east end of the south gallery thereof, a certain monument to the memory of his said late wife, Amy Seager, and others of his family who had previously departed this life—that no judicial or other notice or complaint whatever, was at any time, by any person, taken or made of the erection of the said monument, until on or about the 20th day of July last past; soon after which the said James Seager was served with a certain citation, to appear on the 28th day of August last past, and answer the complaint in this behalf. And this was and is true, &c.

2. That it has been usual and customary, in the said parish of St. James, in Poole aforesaid, previous to the erection of any monument, to obtain the consent of the minister and churchwardens of the said parish, but not to apply for the consent of the said ordinary, except in particular cases—that, accordingly, previous to the said monument being so erected and set up in the said parish church, he, the said James Seager, applied for and obtained the consent of the minister and churchwardens of the said parish, to erect and set up the said monument in the said parish church.

3. That the monument so erected and set up by the said James Seager, in the parish church of

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St. James, in Poole aforesaid, is a mural monument, and does not project from the wall more than three or four inches, or thereabouts, except in one particular part, where it projects five inches, or thereabouts; and no part of it projects or stands out so far as a pillar close to it—that the said monument does not in anywise injure or disfigure the said church, but, on the contrary, is a great ornament thereto, the same being of highly-polished marble, and executed in a superior manner—and that there is nothing in the design of, or inscription on, the said monument, which is at all unsuitable to the place; the same consisting merely of one side of an obelisk, of black and gold marble, with a female figure, of white marble, weeping, and leaning on, or reclining over, an urn of marble, of the same sort, and having underneath a tablet, with the name, age, and time of death, of the said Amy Seager, and others of the family of the said James Seager, engraved thereon.

4. The fourth was the usual concluding article, averring the truth of the premises.

*For the respondent, Mr. Adam, and Drs. Swabey and Dodson.*

The allegation responsive to the articles in this suit was, and is, inadmissible, as pleading no sufficient *legal* justification of the erection of the “monument,” the subject of the suit. We contend the rule of law to be that which, in substance, the articles affirm, namely, that no monument can be set up in a church, without a legal licence, or, the faculty of the ordinary, first duly had, and obtained: and we also contend, *that* if this rule of law be infringed, it will not only be sufficient to found the

*censure* of the ordinary; but that he is invested with full authority to decree a removal. And it is no answer to articles calling upon the defendant to shew cause against the infliction of these penalties for erecting a monument without the ordinary's leave, to say, that he erected it, forsooth, *with the leave, or by the consent, of the minister and church-wardens.*

The circumstance of this monument being an ornament to the church (presuming it to be) instead of disfiguring it, will not alter the rule of law: since its being erected without a faculty is equally illegal, whether it be ornamental or otherwise. It is no defence to a charge of having "usurped the ordinary's authority," to say, that no prejudice to any, in the instance in question, or even that the contrary, has resulted from it. The offence charged is, "the having usurped the ordinary's authority," which is the same in either case—and the legal penalties of its usurpation in this instance, are those already described.

The fitness and convenience of the rule which the articles so affirm, is as obvious as the rule itself is clear and certain. If the ordinary be the sole legal judge of the propriety of any additions to the fabric of the church, of which there can be no doubt—it follows, necessarily, that he ought to be consulted, in the *first* instance, or, prior to any such being made. His power, in this respect, is not arbitrary. His consent to any being, unduly withheld, when properly applied for, will found an application—it is to be presumed, a successful application—to his ecclesiastical superior. *This* is the rule to be collected from the case of Cart and

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Marsh (*a*); not that an appeal *well* lies against the ordinary for promoting his office against those who make additions to the fabric, without applying for his consent at all. This would, in effect, be limiting his privilege to that of removing such, *after first, at his own risk, proving them to be nuisances*; a position utterly untenable, but one, at the same time, which, we apprehend, this allegation being *admitted*, would go but little short of affirming.

The authorities for a position diametrically opposite to this, are sufficiently numerous, and sufficiently precise. Of monuments in churches (*the* additions to the fabrics in question), Sir Edward Coke (*b*), indeed, only says, *generally*, that the erection is *lawful*, if it be done "*in a convenient manner*." But *satis liquet*, both from *other* text writers, and from decided cases, that this to be done *in a convenient manner*, and, consequently, to be *lawfully* done, must be done, with the consent of the ordinary. Such are the doctrines of Gibson (*c*), Degge (*d*), and Prideaux (*e*)—with which the *dicta* of Lord Stowell, sitting in the Consistory Court of London, in the cases of "*Bardin and Edwards against Calcott*," and "*Maidman against Malpas*," respectively (*f*), strictly, in substance, concur. Lastly, it clearly results from adjudged cases—more especially from that of "*Bury versus*

(*a*) *Cart v. Marsh*, Mich. 11 Geo. 2. Strange, 1080.

(*b*) 8 Inst. 110.

(*c*) Codex, pages 453, 454.

(*d*) *Parson's Counsellor*, p. 1. c. 12.

(*e*) *Directions to Churchwardens*, 64.

(*f*) 1 Consistory Reports, pages 14. 205.

the Bishop of Exeter," reported in *Strange* (a), not only that the ordinary is the *sole* judge of what monuments, or the like, are fit to be set up in a church, but that, if set up in a church without his consent, he may proceed, by suit, to remove them, **FOR THAT REASON** [in the words of the printed report, "*as being set up without his consent*"] **MERELY**; and without any reference whatever to the question of their being ornamental, or otherwise, to the fabric of the church.

For these reasons, and upon these authorities, we call upon your Lordships to pronounce *against* this appeal.

*For the appellants—Lushington and J. Addams, Doctors, and Mr. Mereweather.*

We contend that the supposed *impediment here*, the want of a faculty, taken *absolutely* and *per se*, is, *at most*, in the nature, of the *impedimentum impeditivum* merely, and not, of the *impedimentum dirimens*; in other words, that *if*, in the absence of a faculty, the ordinary may interfere to prevent the erection of a monument, still, that the actual erection without a faculty is *no* ecclesiastical offence—*a fortiori* is none that can justify a decree of removal—in the event, that is, of such monument being proved to have been *lawfully* erected; at least in *other* respects; and also, at the same time, to be in itself, neither inconvenient nor unseemly.

If, indeed, a monument were set up in a church in defiance of the ordinary's prohibition, after notice special, or general even, not to erect without a fa-

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(a) *Palmer v. The Bishop of Exeter*, Mich. 10 Geo. 2. *Strange*, 576.

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culty, this might possibly (supposing, for argument's sake, the ordinary's *present* right to prohibit) be good ground for decreeing a removal, without any reference, either to the lawful erection in other respects, or to the fitness and convenience, (or the contrary) of the structure itself. Probably the case in *Strange*, upon which so much stress has been laid, proceeded upon some special considerations of this sort, though not appearing in the printed report, which is contained, literally, in six lines (a). But the case set up here rests upon no *such* grounds. The official neither is, nor can be, shewn to have given any notice not to erect, either special or general even, as it was competent to him to have done; for instance, by exhibiting articles to the churchwardens of Poole at his visitations, or at some one of them, particularly interrogating them as to the practice of erecting tombs in the parish church of Poole, and calling upon them to *present* all persons erecting them without a faculty. Nothing of this sort is pretended; and, in the absence of every thing, we maintain the rule to be that which has just been stated.

It should seem however, as already intimated, by no means *certain*, that the *mere* erection of a monument without a faculty, even after a notice (purely

(a) It is in these words:—Palmer against The Bishop of Exeter. Sir Thomas Bury set up his arms in the church of St. David's, in Exeter. The ordinary promotes a suit in the Spiritual Court to deface them, as being set up without his consent. It was moved for a prohibition, on the authorities, that action lies by the heir for defacing the monument of his ancestors. But Eyre and Fortescue, Justices, said the ordinary was judge what ornaments were proper, and might order them to be defaced. The same was afterwards moved in the Court of Common Pleas, and denied there also. *Strange*, 576.

*gratuitous*) from the ordinary *not* to erect, *is* a punishable offence at all, especially at such same ordinary's own instance, at *the present day*. We admit the *strict* rule of law, *antiently*, to have been, that no monument should be erected without a faculty; at the same time it *must*, in return, be conceded to us, that the observance of that rule has been dispensed with, *by common consent*, in all modern instances. Of all the numerous monuments, tablets, and grave stones, erected to the memories of deceased persons *within* that period, applications for faculties to erect any have rarely, if ever, occurred, in the recollection of the oldest practitioners in Ecclesiastical Courts. The last and latest instance upon record of any interference on the part of an ordinary to check or control this *known* practice of erecting monuments without faculties, is that reported in *Strange*; for which we have to go back more than a century. This, we submit, makes it *questionable*, whether, at the present day, the mere absence of a faculty, *under any circumstances*, can, or should be deemed sufficient to constitute the erection of a monument in any church or chancel, an ecclesiastical offence *at all*. Meantime, the practice so acquiesced in, on all hands, of erecting monuments *without* faculties, has had one *certain* result, namely, that were ordinaries, generally, now to proceed to a removal of the monuments erected without faculties in their several jurisdictions, indiscriminately—as the rejection of *this* allegation would infer them at liberty to do—it would go, this, to the demolition of nearly all the monuments in the kingdom erected within the last 100 years; not,

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probably, without material injury, in many instances, to the actual fabrics of the churches themselves.

Be this, however, as it may, we recur confidently to our first position, that the setting up of *this* monument, under the circumstances, is *no* ecclesiastical offence, still less is one that can justify a decree of removal, in the event of its being proved, that it was *lawfully* set up in *other* respects, and is neither, in itself, inconvenient nor improper. Consequently, the defendants responsive allegation, pledging him to prove *all* this, was and is admissible. The current of authority *uniformly* flows this way—abstract the single case in *Strange*, which proceeded, it may fairly be inferred, on some such *special* consideration as that already suggested. Of *Gibson* and *Prideaux*, cited as authorities by the counsel for the respondent, we shall speak presently. As for the judgments said to have been delivered by Lord *Stowell*, in the case of *Maidman* against *Malpas* and the other, it is obvious, even on a slight inspection of these, not to descend into particulars, that *they* have no pretence whatever to be cited as *authorities* upon the present question. *Degge*, too, may be put out of the case—he speaks of the licence of the ordinary, *or* the consent of the parson and parish, in the alternative, as if either would suffice to justify the erection of a monument in a church. This is clearly erroneous—whatever becomes of the *necessity* for the *ordinary's* consent, that of the parson must, at least, be had—*both* may be necessary—but that the former either includes, or dispenses with, the latter, is, obviously, a mistaken notion. The authority of *Degge*, therefore, we repeat, is of no weight. The real authorities then in point are *Gibson* and *Prideaux*; no mean authorities,



we admit, in the absence of any, or at most in the presence of a single adjudged case; which, however, might well be, and most probably was, decided upon some special circumstances of its own. But, we contend, that, instead of making against us, as insisted, *they* are on our side; that they are with us to the fullest possible extent of making the facts pleaded in this allegation a good defence against the ordinary's proceeding to decree a removal of the monument, hardly admits of a question. Gibson *hopes*, that "if monuments erected without consent, upon inquiry and inspection, be found to the hindrance of divine service," [or as the rule may fairly be extended, be found, upon inquiry and inspection, otherwise inconvenient or improper] he "*hopes* it will not be denied, that the ordinary, *in such case*, hath sufficient authority to decree a removal;" plainly intimating that he, Gibson, could even conceive or imagine him to have sufficient authority to decree a removal, *in no other case*. Gibson, however, is the writer least likely to compromise any fair right of an ordinary—no person had higher notions of the power and jurisdiction of the ordinary in *all* matters appertaining to the church than *Bishop Gibson (a)*,

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(a) The whole passage in Gibson is as follows:—

Monuments, coat-armour, and other ensigns of honor, set up in memory of the deceased, may not be removed at the pleasure of the ordinary, or incumbent. On the contrary, if either they or any other person shall take away, or deface them, the person who set them up shall have an action against them during his life, and after his death the heir of the deceased shall have the same, who, as they say, is inheritable to arms, &c. as to heir-looms; and it avails not that they are *annexed* to the freehold, though that is in the parson. But this, as I conceive, is to be understood with one limitation—if they were first set up with

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Prideaux's authority is equally precise, and to the same identical point. "The monuments, coats of arms painted in the window, or elsewhere, penons, hatchments, &c. put up in the church for the memory of the deceased buried there, if regularly set up with the consent of the minister who hath the freehold," [not a word about a faculty] "cannot be pulled down again either by the churchwardens, minister, or ordinary. But if any of the said particulars be an incumbrance, or any annoyance to the church, or in any way hindering, or incommoding, the minister in performing any of the divine offices, or the parishioners in partaking of them, *in this case*, the ordinary hath power to give his order for their removal." True it is, he adds, "and therefore no one can be *safe* in any new erection in a church who hath not had the bishop's licence for the same; especially in setting up altar monuments which are most-an-end (most generally), a nuisance and incumbrance to the church wherein they are placed."^(a) But this, the *dictum* upon which our opponents mainly rely, well consists with *our* interpretation of what precedes it; and the effect of the whole, we

the consent of the ordinary. For though (as my Lord Coke says) tombs, sepulchres, or monuments, may be erected for the deceased in church, chancel, &c. in convenient manner, the ordinary must be allowed the proper judge of that convenience; inasmuch as such erecting (for so he adds) ought not to be to the hindrance of the celebration of divine service. And if they are erected without consent, and (upon inquiry and inspection) be found to the hindrance of divine service, it will not (I hope) be denied, in such case, that the ordinary hath sufficient authority to decree a removal, without any danger of an action at law. Gibson's Codex, 453, 454.

(a) See Directions to Churchwardens, 64.

apprehend, to be this. If monuments are regularly set up with the leave of the minister singly, the ordinary has power, indeed, to remove; but only in the event of their proving nuisances or incumbrances. But if erected by the bishop's licence *as well*, those who erect them are then "*safe*"—safe, that is, *at all events*—and the erections themselves cannot be removed; but, at least in point of strict law, are entitled to stand as long as the fabric of the church itself, nuisances and incumbrances, or not. So much for Gibson and Prideaux. As for the case of "*Cart and Marsh*," cited also out of *Strange (a)*, it is, clearly, in point neither way—all which can be collected from it to the purpose is, that ordinaries should exercise in such matters a *prudent*, as well as a *legal*, discretion. Now, that the official of Great Canford and Poole is proceeding *imprudently* in this most vexatious interference, altogether, we apprehend, can admit of no question; even granting him, which we deny, to have proceeded *legally*, in rejecting this allegation.

Upon these grounds we insist that your Lordships are bound to pronounce in favour of the present appeal.

DECREE.

The Judges, having heard the allegation read, and advocates and proctors on both sides, by their interlocutory decree, pronounced *for* the appeal, made and interposed in this behalf, and for their jurisdiction, or, rather, for that of our Sovereign Lord the King—reversed the order or decree of the Judge of the Court below appealed from, and re-

(a) *Strange*, 1080.

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tained the principal cause; and therein directed the first sentence of the second article of the said allegation (a), and also the word "accordingly" in the second sentence to be expunged, and, so reformed, admitted the said allegation.

(a) Which stood, *as reformed*, "That previous to the said monument being so erected and set up in the said parish church, he, the said James Seager, applied for and obtained the consent of the minister," &c. See p. 543. The Court, by directing this, may be taken to have expressed its *final* judgment, that "*no practice can absolutely legalize the erection of a monument without a faculty.*"

END OF TRINITY TERM.

# TABLE

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### PRINCIPAL MATTERS.

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3. Administration granted, limited to certain purposes, of the goods of a party deceased, *until his last will* (stated by the deceased himself a few days before his death to be in India), or an authentic copy thereof, should be transmitted from India to this country. *Re Metcalf*, deceased. 343

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2. Adultery is (*now, unquestionably*) pleadable by the defendant in a suit for restitution of conjugal rights, and, if proved, will found a sentence of divorce. *Best v. Best*. 411
3. Adultery of the wife held to be proved; but, under the circumstances, and by reason of the husband's acquiescence, or other misconduct, not to entitle him to a sentence of divorce. *Ibid.* 436, *et seq.*

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## ALTERATIONS, IN A CHURCH.

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## ALTERATIONS, IN A WILL.

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## ANSWERS.

1. In *criminal* suits the defendant's answers upon oath may not be re-

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quired, even to those heads or positions which are not in themselves criminatory: and (though may be) seldom *are*, required to such heads or positions, in those *civil* suits, as of divorce by reason of adultery, and the like, which are founded on *criminal* imputations. *Schultes v. Hodgson*. Pages 105. 111

2. Personal answers *were* twofold—being to be had, in certain causes, on special application, from the proctor in the cause as well as from the principal. *Durant v. Durant*. 118, *et seq.*

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1. In appeals from grievances, the hands of the Court are not tied up till the service of the inhibition; unless the Court has tied up its own hands by deferring to the appeal. *Chichester v. Donegal*. 21
2. Either lapse of time, or acquiescence in the sentence appealed from (*à fortiori* both) perempts all right of appeal. *Schultes v. Hodgson*. 105
3. An appeal only *suspends* the sentence appealed from, does not render it a *nullity*. Hence the statute 3 Geo. 4. c. 75. (which passed *after* a sentence of the Consistory Court of London pronouncing a marriage null and void, by reason of minority and want of consent under 26 Geo. 2. c. 33. though *pending an appeal from that sentence*) held by the Court of Arches in no degree to affect the question of such marriage. *Blyth* formerly *Soden v. Blyth*. 312

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2. Additional articles, however, under circumstances, may be admitted in criminal suits, but not such as contain new criminal charges; or even advance collateral facts and circumstances, in proof of articles of the original set, directly criminal. *Ibid.* 318, *et seq.* *Stone's case.* 319

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2. *Inhibitio tunc tantum operatur effectum attentatorum, quando est canonica.* Pages 23, 24, n.
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2. Marriages by banns prior to 3 G. 4. c. 75. null, in themselves, by reason of undue publication of banns, are not rendered valid by that act. 94, n.
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2. *Quære*, whether the mere holder of a will, monished to bring it in at the suit of one entitled to administration with that will annexed, has any right to insist on proof of *bona notabilia*, in the first instance, and prior to bringing in the will. *Brown v. Coates.* 345
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Brawling in a church, penalty of, under 5 & 6 Edw. 6. c. 4.—Conduct of defendant held to amount to. *Clinton v. Hatchard.* 96

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**CAPACITY.**

2. If a next of kin calls in a probate of a will once taken, though in common form, and puts the executor on proof, *per testes*, of his will, he does it at the peril of costs. *Evans v. Knight and Moore*, 229. *Bell v. Armstrong.* Page 365
3. A next of kin who has acquiesced in probate taken in common form, and has even received a legacy due to him as under a will, is still at liberty to call in such probate, and put the executor on proof, *per testes*, of that identical will—first bringing in the legacy so received. *Bell v. Armstrong.* 365

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1. If a testamentary paper be cancelled, law infers the revocation of it, unless it can *clearly* be shewn, first, that it once existed as a *finished will*, secondly, that the testator adhered to it, *throughout*, in mind and intention, notwithstanding its cancellation. *Thynne v. Stanhope.* 52
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1. If a party cited *as* within the jurisdiction of an ecclesiastical court, though actually resident within another jurisdiction, appear and submit to the suit, such defendant (*à fortiori* one cited to see proceedings by such defendant) is bound to the jurisdiction. *Chichester v. Donegal*. 5
2. *Quære*, whether a citation of the wife at the domicile of the husband, is not sufficient to found the jurisdiction of the court, in a suit even of nullity of marriage against the wife (*à fortiori* in a suit for a separation, &c. by reason of adultery, or the like) wheresoever the

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wife may be actually resident. *Chichester v. Donegal*. Page 19

### CITATIONS, BILL OF.

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3: If a party committed for non-payment of costs under an *erroneous process*, be, *thereupon*, released, the Court is bound, at the application of the party to whom they are *still* due, to issue a new monition for payment of such costs. *Austen v. Dugger*. Page 307

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5. In taxing costs the expence of the monition for payment is always added; and if not obeyed in the first instance, the further, *consequent*, expences necessarily fall on the party whose neglect or refusal to obey in the first instance occasioned them. *Ibid*. 351

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## EVIDENCE.

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1. Witnesses deposing in support of a transaction are liable to a deduction from their *credit*, in proportion to the probable strength of their inducement to support it: a direct pecuniary interest in the event of the suit, of the smallest amount in value, would go to their *competency*, that is, would preclude them from being witnesses at all. *Saph v. Atkinson.* Page 184
  2. What comes from a witness whose *general* character is *strongly* shaken, requires *strong* corroboration to entitle it to belief. *Ibid.* 187
  3. Depositions taken in writing, how preferable, in some respects, to examinations had, *viva voce*, in open Court. *Ibid.* 195
  4. Circumstances *may* come out in evidence with greater effect from *not* having been stated in plea; or, on the contrary, they may give rise to a suspicion of the whole *extra articulate* matter being a mere after thought between the party and the witness. *Ibid.* 200
  5. The evidence of a witness, under circumstances, taken *as* rejected, on the score of a contingent interest in the event of the suit, although the witness was not absolutely *fixed* with a knowledge of it *at the time of her examination.* *Knight v. Evans.* 235
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  7. Evidence upon questions of capacity is commonly *contradictory*, and why—so far as it goes to *mere opinion* (unless it be that of professional men of eminence, p. 244.)
- the Court is accustomed to rely but little on such evidence; but will form its own judgment from *facts*, and from the conduct of parties about the deceased *at the time.* *Evans v. Knight.* Page 239
8. The deposition, under circumstances, may be received of a witness, who has neither signed it, nor been repeated, nor been examined upon the interrogatories of the adverse party. *Ibid.* 240
  9. If probate of "signed instructions" be granted in common form, upon a special affidavit of the solicitor who took them, a next of kin, calling it in, after the death of the solicitor, and putting the executor on proof *per testes* of the "instructions," is not, at the same time, entitled to insist, on such special *affidavit* of the solicitor being discarded, altogether, as evidence in the cause. *Ibid.* 251. 3
  10. A witness who has been repeated and dismissed long anterior, may not always, or as mere matter of course, be examined upon articles of a plea which she had not been designed to at the time of her production, and consequently had not been examined upon, in the first instance. *Wilkinson v. Dalton.* 329
  11. A witness shall be compelled to answer as to whether he is or is not responsible, in some way, for the party's expences, in whose behalf he is examined, *explicitly.* *Hudson v. Beauchamp.* 352
  12. The *credit* of a witness in any suit may be impeached by shewing him to have made statements, *contrary* to what he has *sworn*, out of Court. *Locke v. Denner.* 360
  13. Of certain witnesses, in certain causes, every circumstance however slightly and collaterally only affect-

## EXCEPTIVE ALLEGATION.

ing the credit, may fairly be pleaded. *Locke v. Denner.* Page 361

14. If instructions are propounded, the writer of which, a solicitor, dies before his examination can be taken upon the allegation propounding them, the Court will presume the allegation to have been drawn up pursuant to such solicitor's advice, and that his evidence, if taken upon, would, *in the main*, have sustained the allegation. But the party propounding the instructions can neither be permitted to plead, nor would derive any benefit from pleading, that "a copy of the allegation propounding the instructions had been submitted to the solicitor, and returned by him" indorsed, "settled, and approved," annexing moreover such draft allegation itself, so indorsed, to the plea. *Popple v. Cunnison.* 382

15. *Particeps criminis*, in a cause of adultery, evidence of, how receivable. *Best v. Best.* 437, 438

16. *In re lupanari, testes lupanares admittentur.* *Ibid.* 437

## EVIDENCE OF HAND-WRITING.

See HAND-WRITING.

## EXCEPTIVE ALLEGATION.

The admission of an exceptive allegation may be suspended till the hearing of the principal cause, when the Court will permit evidence to be taken upon, or will finally reject it, according as it then appears that the credit due to the witness attacked, is, or is not, essential to a right decision upon the merits of the principal cause. *Evans v. Knight.* 138

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## EXHIBITS.

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*Quare*, whether the ordinary is absolutely barred, in the exercise of his discretion, from granting a faculty confirmatory of certain alterations made in a parish church, by reason of any mere omission of legal form in the publication of notice of the vestry, at which such alterations were resolved upon by the parish, and the churchwardens were empowered to make them. *Thomas v. Morris.* 470

## FEME COVERT.

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## FINDING.

Inferences in favour of alleged wills, or the contrary, from the place and circumstances of *finding*, 53. 136. 164. 409. 456. 493

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1. Evidence of hand-writing, general doctrine with respect to. *Saph v. Atkinson.* Pages 212. 219
2. An alleged will, the validity of which is denied, cannot be proved by mere evidence to the *hand-writing* of the party whose alleged will it is. *Ibid.* 213
3. Evidence of, by comparison of hands, clearly admissible, at least in Ecclesiastical Courts—*may even be the best evidence.* 214, *et seq.* 360

### HUSBAND.

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## IMPERFECT PAPERS.

See ATTESTATION CLAUSE.—INSTRUCTIONS. — UNEXECUTED WILL.

1. A testamentary paper, which is neither a finished will in itself, nor proved to have been such in the deceased's apprehension of it, is of no effect—it appearing that the deceased had full time and opportunity, if he had thought proper so to do, to have rendered it a finished will. *Roose v. Mouldsdaie.* 129
2. The sudden death of an alleged testator, taken *per se*, is not sufficient to entitle inchoate and incomplete testamentary papers to probate: it must further be shewn that they were in progress *towards* completion at that time, so as to warrant an inference, that the testator was *prevented* from completing them by that event alone. *Warburton v. Burrows*, 383. *Antrobus and*

## INSTRUCTIONS.

*Booth v. Nepean*, 399. *Lavender v. Adams.* Page 406

### INHIBITION.

See APPEAL, 1.—ATTENTATS, 1, 2.

Notice, in the nature of a caveat, against the issue of an inhibition entered in the Arches Registry, upon the authority of a precedent in Lord Herbert's case. *Chichester v. Donegal.* 23, n.

### INSANITY.

See CAPACITY.

1. A will partially defaced by a testator whilst of unsound mind, is to be pronounced for as it existed in its integral state, that being ascertainable. *Scruby and Finch v. Fordham.* 74
2. If a testator of impeached sanity do some act as with relation to his will, whose state of mind, at the time of doing which, there is nothing to evidence, *aliunde*, his rationality at such time, or the contrary, is to be inferred from that of his act. *Ibid.* 74
3. Partial insanity may invalidate a will which can be traced up to, and be inferred to have proceeded directly from, such partial insanity. *Dew v. Clark.* 279. See *Greenwood's case*, (*in notis*) p. 283.

## INSTRUCTIONS.

1. "Instructions for a will," so headed and indorsed, and how imperfect soever in themselves, if proved to have been *signed* by a deceased (even many years before her death) with intent to render them operative, *pro tanto*, in the event of her dying, without doing any further or other testamentary act, are entitled to probate. *Popple v. Cunison.* 377

## INVENTORY.

2. A letter of "instructions" written by the deceased to his solicitor respecting certain alterations to be made in his will, two months before his death, propounded as a codicil—allegation rejected—it being held that such letter did not argue the deceased to have fully made up his mind as to the proposed alterations even at that time; and that if it did, still, that the presumption of abandonment arising from a lapse of two months without any act done, was not effectually rebutted by the facts pleaded. *Antrobus and Booth v. Nepean*. Page 399

## INTEREST (CAUSES OF.)

In causes of interest, both cases being disclosed, it is advisable that each party should admit so much of the other's case as he may (the whole if he may) consistently with, and without prejudice to, his own case. *Thomas v. Maud and Pickwell*. 331. See also 481 and 482, and notes.

## INTERESTED WITNESSES.

See EVIDENCE, 1. 5. 11.

## INVENTORY.

1. An inventory and account may be dispensed with by the Court, if not applied for till after so long a period, that, in conjunction with circumstances, it affords a reasonable presumption of the deceased's estate having been fully administered and disposed of. *Ritchie v. Rees and Rees*. 144
2. Law has fixed no time certain, as that within which an inventory and account must be sued. *Ibid*. 146
3. Administrators (especially creditor administrators) are bound to ex-

## JURISDICTION. 565

- hibit inventories, &c. even though uncalled for. *Ritchie v. Rees and Rees*. Page 152
4. The executors of a deceased administrator (and so, not the personal representatives of the first deceased, the intestate) may still be called upon for an inventory and account of the intestate's effects, upon a reasonable presumption being raised that any part of such effects has travelled into their hands. 158

IRISH MARRIAGE, (*Fact of*)  
How proveable, see MARRIAGE, 1.

## IRRATIONAL ACT.

See INSANITY.—OBLITERATION.

An act, under circumstances, may be deemed irrational, which is capable of no assignable reason. *Scrubby v. Fordham*. 91

## IRREVOCABILITY.

1. The irrevocability of an instrument propounded as a will, destroys its very essence as a will, and converts it into a contract, a species of instrument over which testamentary Courts have no jurisdiction. *Hobson v. Blackburn*. 278, 9
2. If a man make his last will and testament irrevocably, yet he may revoke it. *Ibid*. 279, n.

## JURISDICTION.

See BONA NOTABILIA, 1, 2, 3.—  
CITATION, 1, 2.—CITATIONS,  
BILL OF, 1.

1. The Court of Prerogative has no jurisdiction over royal wills, or to grant administration of the effects of a sovereign dying intestate. "*Motion in the goods of his late Majesty*." 255

2. Jurisdiction of the testamentary Courts of the two archbishops, what. "*Motion in the goods of his late Majesty.*" Page 266

## KING'S PROCTOR.

1. An application to the Court for its process, calling upon his Majesty's proctor to see a testamentary paper of his late Majesty propounded and proved, rejected, and upon what principles. "*In the goods of his late Majesty.*" 255, *per tot.*
2. The King's proctor is a mere law agent of his Majesty, to protect the interests of the crown, and cannot be made a defendant so as to bind the Sovereign in any matter touching his personal rights, 270. *Supposed precedents for his being so made, stated and refuted.* 271, 2

## KIN, NEXT OF.

See ADMINISTRATION, 4.—CALLING IN PROBATE, 2, 3.—LEGACY.

Next of kin, as such merely, are entitled to call for proof, *per testes*, of any deceased's will not already so proved (and to some extent, as against *them*) of common right. *Bell v. Armstrong.* 372

## LECTURER.

No person can be a lecturer, though elected by the parish, without the rector's consent—unless there be an immemorial custom to elect without his consent. *Clinton v. Hatchard.* 103

## LEGACY.

See CALLING IN PROBATE, &c. 3.

A next of kin who has received a legacy as under a will of which

## MONITION.

probate has been taken in common form, *must* bring in such legacy to the registry of the Court, before he can be permitted to put the executor on proof, *per testes*, of that will. *Core v. Spencer, &c. in notis.* Page 374

## MARRIAGE.

1. A marriage in Ireland between parties held to be proved by *circumstantial* evidence; and administration of the wife's effects, thereon, decreed to the husband. The alleged nullity of such marriage, on account of its celebration by a popish priest, held to be not proved. *Steadman v. Powell.* 49
2. "*Semper præsuntur PRO matrimonio,*" a presumption not always repelled by the marriage having been a clandestine one. *Ibid.* 65
3. Where one whose interest as a husband is denied, has proved a fact of marriage, the burthen of proving its alleged nullity rests with the other party, the party setting it up in plea. *Ibid.* 65
4. A marriage by licence deemed null and void under 26 G. 2. c. 23, by reason of minority and want of legal consent—a nullity held, under the circumstances, *not* to be cured by 3 G. 4. c. 75. s. 2. *Bridgwater v. Crutchley.* 473

## MINORITY.

See MARRIAGE, 4.

## MISTAKE.

Mistakes in a codicil corrected. 468, n.

## MONITION

For costs, see COSTS, 4, 5.  
To bring in will, see BONA NOTABILIA, 2.



## NULLITY OF MARRIAGE.

### MONUMENT.

1. An allegation—responsive to articles, in a cause of office, promoted by the official of a peculiar against the defendant, calling upon him, 1st. to answer to “having illegally set up a monument in a certain church in his peculiar, without a faculty;” and, 2dly. to “shew cause why he should not be decreed to remove the same”—pleading, 1st. that “the said monument was erected by leave of the minister and churchwardens;” and, 2dly. that “the said monument, instead of injuring or disfiguring, is an ornament to the said church”—admitted to proof by the High Court of Delegates. See *Seager v. Bowle*, per tot. Page 541
2. No practice can legalize the erection of a monument without a faculty. *Ibid.* 554

### MUTUAL WILLS.

Mutual, or conjoint wills (so styled), irrevocable by either of the (supposed) testators, are unknown to the *testamentary* law of this country—that is, are unknown, *as wills*, to the law of this country *at all*—what effect soever may be given to such instruments in equity. *Hobson v. Blackburn.* 274

### NOTICE OF VESTRY.

See FACULTY.

## NULLITY OF MARRIAGE.

See Banns, 1. & 2.—MARRIAGE, 1. 3. 4.

Suits of nullity of marriage may be brought (at least in some cases) by parties having interests in remainder. 16

## PAUPER.

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### NUNCUPATIVE WILL.

The *factum* of an alleged nuncupative will requires to be proved by evidence much more strict and stringent than that of an alleged written will—in addition to strict proof of *all* the requisites to the validity of a will of that species (as the “*rogatio testium*,” &c.), under the statute of Frauds—to entitle it to probate. *Le Mann v. Bonsal.* Page 389

### OATH, ANSWERS ON.

See ANSWERS, 1, 2.

### OBLITERATION.

See INSANITY.—LEGACY.

The obliteration of a legacy held to be irrational, both in itself, and in the testator's mode of doing or performing it—consequently, the legacy itself, in substance, pronounced for. *Scruby v. Fordham.* 88. 92

### ORDINARY.

See FACULTY.—MONUMENT.

### PAPERS, IMPERFECT.

See IMPERFECT PAPERS.

### PARI PASSU.

In what cases and causes parties must proceed, *pari passu*, unless by consent. See 482, and notes.

### PARTICEPS CRIMINIS.

Examined to prove adultery charged upon the wife—evidence of, how to be received. *Best v. Best.* 437. 438

## PAUPER.

See COSTS, 2.—DEFAMATION, 2.

A party's swearing himself not to be

## PLEADING.

worth 5*l.* after payment of all his just debts, gives him no infeasible right to be admitted a pauper—the fact, if denied, must be specifically proved. Nor will even proof of that fact suffice, if the party can be fixed with the receipt of a competent income. *Clifford v. Mabey.* Page 124

## PECULIAR, ROYAL.

See APPEAL, 4.

## PENCIL.

Alterations in a will made in pencil, see ALTERATIONS.

## PENDING SUIT (ADMINISTRATION).

See ADMINISTRATION, 1.

## PERSONAL ANSWERS.

See ANSWERS.—PROCESS (SERVICE OF).

## PLEADING.

See ADULTERY, 1, 2.—ARTICLES, 1, 2.—EVIDENCE, 12, 13, 14.

1. In a testamentary suit, a variety of slight circumstances are pleadable, where the case set up by the other party is charged, by the party pleading, as a case of fraud. General rules as to pleading in such cases. *Locke v. Deuner.* 353. 362
2. It is desirable to compress allegations into the narrowest possible compass within which all relevant facts can be fairly and adequately stated—especially in cases which necessarily spread into a great quantity of matter. Rules whereby a too diffuse mode of pleading, generally, may be avoided. *Id.* 362. 364

## PROCESS (SERVICE OF).

## PLENE ADMINISTRAVIT.

See INVENTORY.

Opposite probabilities as to a *plene administravit* stated and examined. *Ritchie v. Rees.* Page 147, 148

## POOLE.

A Royal Peculiar. See APPEAL, 4.

## POPIISH PRIEST.

Alleged nullity of a marriage in Ireland, by reason of its celebration by a Popish priest, held not to be sustained. *Steadman v. Powell.* 58

## PRACTICE.

See ADULTERY, 2.—ANSWERS, 1, 2.—CITATION, 1, 2.—COSTS. PROCESS (SERVICE OF).

*Old rules of practice* which are consonant to reason and analogy, and have undergone no authoritative alteration, ought to govern the practice of courts at the present day. *Durant v. Durant.* 118. 123

## PRESUMED ABANDONMENT OF WILL.

See ATTESTATION CLAUSE, 1, 2. INSTRUCTIONS, 2.—UNEXECUTED WILL.

## PROCESS (ERRONEOUS).

See COSTS, 3.—SIGNIFICAVIT.

## PROCESS (SERVICE OF).

Whatever is to be done, *personally*, by the party *principal* in a cause, requires, in strictness, a *personal* service of the notice, or decree for doing it, upon the party *principal*. Hence the service of a “decree for answers,” upon the *proctor*

## RATE (CHURCH).

(though a sufficient service of it for some purposes, p. 121.) will not justify the Court in putting the *principal* in contempt, if those answers are not brought in. *Durant v. Durant.* Page 114

## PROHIBITION.

Application for a prohibition to restrain the Consistory Court of London from proceeding in a suit, rejected by the Vice-Chancellor, *Chichester v. Donegal.* 19, n.

## PROOF.

See EVIDENCE.—MARRIAGE, 3.

The burthen of proof ordinarily rests with parties setting up the affirmative of any question. *Saph v. Atkinson.* 163

## PROOFS.

1. In criminal proceedings, the Court will examine the proofs with the strictest possible attention, in order to give the defendant the benefit of any defect or failure of evidence; especially where he is undefended by counsel. *Saunders v. Davies.* 292
2. The Court always expects the proofs to be precise in *ex parte* matrimonial suits. *Bridgewater v. Crutchley.* 474

## PROTESTANTS.

Alleged marriage of, in Ireland, by a Popish priest, see MARRIAGE, 1.

## RATE (CHURCH.)

Libel pleading a church rate, including "*stock in trade*," admitted to proof by the High Court of Delegates. See *Miller v. Bloomfield,* *per tot.*

## REVIEW.

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## RECOGNITIONS.

Effect of recognitions of testamentary papers, what, 207. Supposed, stated, and examined. Pages 207. 212

## RELEASE OF COSTS.

See COSTS, 3.

## REPAIRS (CHURCH).

See RATE.

## RE-PUBLICATION OF WILL.

See CODICIL, 1.

The re-publication of a will is tantamount to the making of that will *de novo*. Consequently, upon the universal principle, that of any number of wills, the last and latest is that in force, it revokes any will of a date prior to that of the re-publication. *Rogers v. Pittis.* 38

## RESCINDING THE CONCLUSION OF A CAUSE.

*Quare*, whether the Court has power to rescind the conclusion of a cause after sentence, against the sense and consent of the party for whom that sentence was given. *Thomas v. Maud.* 481

## RESIDENCE.

See CITATION, 2.

## RESTITUTION OF CONJUGAL RIGHTS.

See ADULTERY, 2.

## REVIEW, COMMISSION OF.

1. Commission of review in *Sir George Savile's case*—grounds that

influenced the discretion of the Crown in granting. *Page 413, n.*  
 2. In the case of *Matthews v. Warner*.  
 159, 160, n.

## REVOCATION OF WILL.

*See CODICIL.*

Questions of revocation are all, to some extent, questions of intention. Hence testamentary instruments (regularly executed ones, in particular) are *hardly* to be deemed revoked by mere inference, and implication, under *any* circumstances; but certainly not, under circumstances tending to shew that the testator's *intention* was *not* to revoke them. Upon this principle, where A., by a *sixth* codicil to his will, "confirmed and re-published" his said will, and "the several codicils thereto, [specifying *two*, by their dates, and omitting any mention of, or reference or allusion to, either of the other *three*], this held, under the circumstances, not to amount to any *revocation* of either of the other three. *Smith v. Cunningham*. 448

## ROGATIO TESTIUM.

*See NUNCUPATIVE WILL.*

"Listen, all of you, what I, Elizabeth Jones, do say," &c. *Quare*, whether a sufficient "*rogatio testium*," within the statute of Frauds. *Le Mann v. Bonsall*. 394

## ROYAL WILLS.

*See JURISDICTION.—KING'S PROCTOR.*

## SANITY.

*See CAPACITY.—INSANITY, 1, 2,*

## SUSPENSION.

### SERVICE OF PROCESS.

*See PROCESS.*

### SIGNIFICAVIT.

A *significavit* not stating the nature of the *cause*, &c. so as to fix this within the jurisdiction of the Ecclesiastical Court, &c. radically defective. *Austen v. Dugger*. *Page 307*

### STATUTES.

11 Hen. 7. c. 12. p. 125.—21 Hen. 8. c. 5. p. 265.—23 Hen. 8. c. 9. p. 17; c. 15. p. 287.—24 Hen. 8. c. 12. p. 108. 264.—5 & 6 Ed. 6. c. 4. p. 96.—13 Eliz. c. 12. p. 320. 43 Eliz. c. 2. p. 511.—13 & 14 Car. 2. c. 4. p. 103.—22 & 23 Car. 2. c. 10. p. 265.—29 Car. 2. c. 3. p. 389.—6 & 7 Wm. 3. c. 6. p. 73.—7 & 8 Wm. 3. c. 35. p. 73. 10 Anne, c. 19. p. 73.—12 Geo. 1. 1r. c. 3. p. 73.—2 Geo. 2. c. 28. p. 125.—9 Geo. 2. c. 36. p. 38.—19 Geo. 2. c. 13. 1r. p. 59.—26 Geo. 2. c. 33. pp. 9. 16. 28. 93. 94. 289. 312. 473. 479.—39 & 40 Geo. 3. c. 88. p. 272.—53 Geo. 3. c. 127. pp. 108. 114. 308.—58 Geo. 3. c. 69. p. 471.—3 Geo. 4. c. 75. pp. 28. 94. 312. 479.

### STOCK, LIABILITY OF,

To payment of church rate, *see RATE*.  
 To payment of poor rate. 511, 512

### SUDDEN DEATH.

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### SUSPENSION.

1. Suspension of a person in holy orders for habitual drunkenness, profaneness, &c. *Saunders v. Davies*, 291. *Dicks v. Huddesford*. 298

## WIFE.

2. A sentence of suspension, precedent of. *Page 299*

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## VERDICT.

Verdict against the adulterer pleaded in a suit for a divorce, by reason of the wife's adultery—and effect of. *Best v. Best.* 438

## VESTRY (NOTICE OF.)

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## UNEXECUTED WILL.

An unexecuted will may be pronounced for, though the testator delayed to execute it for two months after it had been fair copied for execution—under circumstances deemed sufficient to rebut the ordinary presumption of abandonment created by such delay. *Warburton v. Burrows.* 383

## WIDOW.

Usually preferred to next of kin in grant of administration, and, notwithstanding her having married again. *Webb v. Needham.* 494

## WIFE.

*See* ADULTERY, 1. 3.—CRUELTY, 1, 2.—FEME COVERT.

## WITNESS.

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## WILL.

1. If a will is before the Court, the validity of which is *admitted*, the Court will pronounce for it in preference to an alleged subsequent will, of the genuineness of which it entertains any serious doubts.

For the principles upon which Courts of probate proceed, where the inquiry is, whether an asserted will was or was not the act of the alleged testator, *see Saph v. Atkinson.* *Page 162, et seq. per tot.*

2. The Court may pronounce in favor of an *admitted* former will, without deciding, *affirmatively*, that an alleged latter one (*though denied to be the testator's act, at all*) is a forgery. *Ibid.* 183

## WILL, DESTRUCTION OF.

*See* DESTRUCTION.

## WILL (NUNCUPATIVE.)

*See* NUNCUPATIVE WILL.

## WILL (ROYAL.)

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## WILL (UNEXECUTED.)

*See* UNEXECUTED WILL.

## WITNESS.

*See* EVIDENCE.

END OF THE FIRST VOLUME.

#### ERRATA.

- Page 32, line 27, for "in all hands," read "on all hands."  
39, line 20, for "21st of July," read "1st of July."  
40, line 6, for "formed," read "found."  
49, line 8, for "always," read "already."  
61, line 18, for "and may be convenient," read "and it may be convenient."  
115, line 1, for "This is an appeal," read "This is an appeal."  
136, line 26, for "places which," read "places in which."  
198, last line, for "no more unimportant," read "no mere unimportant."  
233, line 15, for "impunging," read "impugning."  
252, line 24, (in the notes) for "parties having lost," read "parties have lost."  
257, line 14, for "affidavit," read "affidavits."  
260, line 10, *delete* the words "and hear."  
282, line 23, for "repelling," read "rejecting."  
284, line 21, for "revolvable," read "resolvable."
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